

EXHIBIT B

OPUS | 2

INTERNATIONAL

BSG Resources Limited (In Administration) v (1) Vale S.A. (2) Filip De Ly (3)
David A.R. Williams (3) Michael Hwang

Day 1

September 4, 2019

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one finds at CPR 62.10 at 706. What that says is the court may order an arbitration claim be heard either in public or in private. Rule 39.2 does not apply:

"Subject to any order made under paragraph 1, the determination of a preliminary point of law [which does not apply here] or an appeal under section 69 will be heard in public and all other arbitration claims will be heard in private."

So the starting point is that the section 68 which will come on in November will be heard in private, subject to the court's power under CPR 62.10(1). Again, the starting point, and the presumption, is that the security for the claim application under section 70(70) or the security for costs application again should be heard in private.

The other side contend that the enforcement proceedings -- enforcement part of this hearing, our application to set aside or to stay the order of Mr Justice Bryan presumptively should be heard in public but in our respectful submission that is a misreading of the rules, because what one has to look at is Part 3, which one finds at page 711, which deals with enforcement. 62.17:

"Section ... applies to all arbitration enforcement proceedings other than a claim on the award.

in an article by Sebastian Perry, headlined, "Award in Guinea bribery dispute made public". Therefore, as it were, the horse has left the stable in any event.

In addition to that overwhelming practical argument, the court has a discretion. We accept that the challenge to the award would presumptively be in private but with the court having a discretion to hear it in public. But we say the opposite is true of the enforcement action in which Mr Gruder's clients bring an application. So we have a position where the court as it were could start --

MRS JUSTICE MOULDER: I think Lord Mance described it as a starting point rather than a presumption in *Bankers Trust v Moscow*, so I think public is a starting point. That includes arbitration, that is what he was dealing with.

MR FOXTON: My Lady, one can see that in a dispute that remained entirely confidential, it might be a pretty significant starting point but we say in one where the terms of the award are already in the public domain, plainly it cannot be. So, my Lady, for those reasons we ask for an order it be in public.

MRS JUSTICE MOULDER: Yes. Thank you.

Submissions by MR GRUDER

MR GRUDER: My Lady, it's necessary to go to the rules which

"An application for permission under section 66 to enforce an award in the same manner as a judgment or an order may be made without notice in an arbitration claim form."

That has already happened and the order has been granted. But 3 is important:

"The parties upon whom the arbitration claim form is served must acknowledge service and the enforcement proceedings will continue as if they were an arbitration claim under section 1 of this Part."

So our application to set aside or stay Mr Justice Bryan's order is continuing today as if it were an arbitration claim under section 1 of this Part.

If on that basis one then goes back to 62.10, and one goes to 62.10(3)(b):

"All other arbitration claims will be heard in private."

So we say that the presumption is that all the applications today should be heard in private and we would submit that is the right position.

The fact that details have leaked out, whether by way of US court proceedings or by way of the Global Arbitration Review, should not mean that this court should subvert the confidentiality of the arbitration award and the grounds of our application

1 more than it has been subverted already.

2 There is a reporter waiting outside. He approached
 3 us. And if my Lady says that this is in public, then
 4 potentially everything we say today will be able to be
 5 reported in the press, and in my respectful submission
 6 that would be wrong and contrary to the position, both
 7 under the rules and the authorities, that the
 8 presumption is that arbitration hearings and
 9 applications relating thereto should be in private.

10 In my respectful submission, supposing I'm wrong on
 11 my construction of CPR 62, then in my submission the --
 12 and my learned friend is right, then the enforcement
 13 part of today's hearing would be potentially in public,
 14 but that would, in my submission, subvert the other
 15 parts of this hearing which unequivocally, and I don't
 16 think it's denied, should be in private.

17 So in my respectful submission, the whole of today's
 18 hearing should be in private.

19 Submissions by MR FOXTON

20 MR FOXTON: My Lady, very briefly, details have not leaked.
 21 They have come into the public domain as a result of the
 22 proper application of US court procedure where
 23 proceedings have been commenced. So far as enforcement
 24 is concerned, we do say that Mr Gruder has misunderstood
 25 the effect of the section on enforcement that he was

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1 quoting from page 711 of volume 2, which is dealing with
 2 the time limits in case management steps.

3 On his argument it would appear to be that
 4 an enforcement action will be public if no
 5 acknowledgement of service is filed and then becomes one
 6 that should be private as a matter of a starting point
 7 if one is. That simply isn't what that rule is about.
 8 But the overwhelming point, my lady, is that the matter
 9 is in the public domain not as a result of any improper
 10 behaviour or breach of confidence but as the result of
 11 the application of US procedural law.

12 Submissions by MR HOOKER

13 MR HOOKER: My Lady, I find myself in the curious position
 14 of endorsing many of Mr Gruder's submissions. In my
 15 submission today's proceedings should be in private and
 16 I only add that of course my clients, who are the
 17 arbitrators are parties only to the action to set aside
 18 the award, they're not parties to the action on
 19 enforcement. But for the reasons that have been set out
 20 in my submission the strong presumption in favour of the
 21 set aside being in private should be maintained.

22 MRS JUSTICE MOULDER: Sorry, you just referred to
 23 submissions. Have you put -- I'm afraid, if you've put
 24 in a skeleton I haven't received one.

25 MR HOOKER: No, I haven't.

1 MRS JUSTICE MOULDER: I'm sorry, I just wanted to
 2 double-check because it does happen that skeletons don't
 3 make their way to me. All right. Thank you.

4 Judgment removed for approval

5 MR FOXTON: My Lady, I am obliged. I think the sign may
 6 need to come off the door. I think the gentleman who
 7 appeared was in fact a law reporter who may well come
 8 back towards the day in any event but nonetheless it
 9 should reflect the order that your Ladyship has just
 10 made.

11 MRS JUSTICE MOULDER: Could you make the change, please?
 12 Thank you. Yes.

13 Submissions by MR FOXTON

14 MR FOXTON: My Lady, there are three applications today,
 15 there are my clients' applications for conditions on
 16 BSGR's pursuit of its section 68 application. There's
 17 BSGR's application to set aside Mr Justice Bryan's order
 18 giving permission to enforce and then there is, if time
 19 permits, BSGR's application for permission to amend its
 20 section 68 application. I think Mr Hooker in particular
 21 wants to be heard on that amendment application.

22 My Lady, what I was proposing and I discussed this
 23 with Mr Gruder, is that I would open Vale's
 24 applications, I would then let Mr Gruder open his own
 25 applications while responding to my application and then

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1 I would reply on mine, respond to his and he would get
 2 a last word on his own applications at the end.

3 MRS JUSTICE MOULDER: All right.

4 MR FOXTON: Now, on that basis I was going to briefly take
 5 the court the underlying arbitration and award, then
 6 look at the principles relevant to the court's
 7 discretion to impose conditions under section 77, and
 8 then within that framework look at two points. Briefly,
 9 the flimsy nature of BSGR's challenge and, second, why
 10 we say that there is a real risk of prejudice to Vale in
 11 relation to enforcement and recovery as a result of the
 12 challenge that BSGR has brought to the award.

13 Then finally on security for costs the issue is
 14 purely one of quantum. I'm going to be very brief on
 15 that when we come to it.

16 Now, so far as the background is concerned, I think
 17 the court will have seen from the skeletons that BSGR
 18 had been granted certain concessions by the Government
 19 of Guinea, and in 2010 my clients entered into a joint
 20 venture agreement and shareholders' agreement with BSGR
 21 to exploit those concessions. In April 2014 the
 22 Government of Guinea revoked BSGR's concessions after
 23 having determined that BSGR had obtained them by
 24 bribery. Obviously that rendered the concessions
 25 worthless and Vale commenced an LCIA arbitration against

1 BSGR in April 2014.

2 It is fair to say that the course of that
 3 arbitration did not run smoothly. When the parties were
 4 before Mr Justice Popplewell in 2017, I described BSGR's
 5 strategy as being one of guerrilla arbitration tactics
 6 and returning to the dispute two years on that
 7 description remains entirely accurate. Now, the
 8 procedural history is summarised in a section at the
 9 beginning of the award in bundle 4, tab 16, beginning on
 10 page 24.

11 My Lady, taking the matter I hope relatively
 12 efficiently, one sees from paragraph 29 that in
 13 October 2014 BSGR filed the first of what were three
 14 applications in the event to seek to stay the first --
 15 the LCIA arbitration. The first of those stay
 16 applications seeking an order pending the outcome of
 17 a separate arbitration, an ICSID arbitration, an
 18 investment treaty arbitration between BSGR and the
 19 Republic of Guinea. That application was rejected by
 20 the tribunal essentially because it was too early, as
 21 one can see from paragraph 30, to know how the ICSID
 22 dispute would develop.

23 Notwithstanding that, the stay application was
 24 renewed some five months later by BSGR on 20 May 2015.
 25 One sees that from paragraph 36 at the bottom of page 25

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1 and that application was refused because the tribunal
 2 said there had been no material change of circumstances
 3 since they had previously ruled on the same issue five
 4 months before.

5 Now, the tribunal did order, effectively by consent,
 6 subject to one exception -- and this is in
 7 paragraph 37 -- that there would be record-sharing
 8 between the two arbitrations so that documents and
 9 productions in one, in the LCIA arbitration, would be
 10 available for BSGR in the ICSID arbitration and
 11 similarly material that BSGR got in the ICSID
 12 arbitration would be made available in the LCIA
 13 arbitration, subject to certain matters where BSGR said
 14 that there was separate issues of confidentiality that
 15 arose. But that was effectively ordered with the
 16 consent of the parties.

17 Now, what then happens, if one goes on to
 18 paragraph 66 on page 30, is that BSGR brought challenges
 19 to remove all three arbitrators on five grounds. That
 20 challenge was brought on 5 May 2016, less than three
 21 months before the merits hearing was due to start at the
 22 end of August 2016. And challenges were initially
 23 brought to the LCIA court and if one jumps ahead, but
 24 perhaps keeping a finger in page 30, to paragraph 82 on
 25 page 33, one of those challenges succeeded. This was

1 a challenge to the appointment of
 2 His Honour Judge Charles Brower as chairman based upon
 3 remarks he had made about the arbitration at
 4 a conference. None of the other challenges succeeded
 5 and in particular none of the challenges to
 6 Dr Michael Hwang and Sir David Williams succeeded.

7 So whilst BSGR make much of the fact that they can't
 8 be said to be completely frivolous because one of their
 9 challenges has been upheld, it is important to note the
 10 wholesale rejection of the other grounds.

11 The removal of His Honour Judge Charles Brower
 12 obviously led to the requirement that a new chairman of
 13 the arbitration be appointed. BSGR raised complaints
 14 about how the tribunal went about that, which at one
 15 stage formed one of the grounds of the section 68 but as
 16 that challenge is no longer pursued I don't say anything
 17 more about it.

18 In the event the chairman was appointed by the LCIA
 19 court and it was Professor Dr De Ly, and one can see
 20 that, if necessary, from paragraph 96 on page 35.

21 Now, my Lady, what then happened at paragraph 100 on
 22 the same page is BSGR then brought a second challenge to
 23 Dr Hwang and to the other arbitrators and brought a yet
 24 further stay application pending the outcome of that
 25 challenge.

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1 The LCIA court heard and rejected that challenge.
 2 Their ruling is at paragraph 120 on page 39. Now,
 3 I mentioned to my Lady a moment ago that the merits
 4 hearing had been fixed for the end of August and
 5 beginning of September 2016. In the event, what the
 6 tribunal did was cancel the evidentiary hearing -- this
 7 is paragraph 101 on page 36 -- but held what was to be
 8 an educational hearing, the purpose of which would be to
 9 bring the members of the tribunal up to speed with the
 10 materials and the dispute and also to resolve various
 11 outstanding procedural issues.

12 But BSGR wrote to the tribunal on 25 August saying
 13 that they would not participate in the educatory hearing
 14 and they would not provide written submissions,
 15 including written submissions on whether the tribunal
 16 should adopt decisions made by the previous constitution
 17 of the tribunal at the stage when His Honour Judge
 18 Charles Brower was the chair.

19 Now, the challenge that had been brought to
 20 Sir David Williams and Dr Michael Hwang came before the
 21 Commercial Court because it was renewed by BSGR, and it
 22 was heard by Mr Justice Popplewell and was wholly
 23 unsuccessful. And I do want briefly just to show your
 24 Ladyship what Mr Justice Popplewell, and indeed
 25 Lord Justice Christopher Clarke said about the challenge

1 in the context of reviewing it and for that one needs to
2 go to bundle 1, tab 7.

3 Now, the cost ruling by Popplewell J is at bundle 1,
4 tab 7, page 7, and he noted at paragraph 3 that the
5 challenges were totally without merit, that the decision
6 of the LCIA court should have put an end to the matter.
7 He noted at paragraph 6, for example, that there was
8 simply no evidence of substantial injustice. And
9 paragraph 7 is interesting because there is, I'm afraid,
10 an element of *déjà vu* for those of who participated in
11 that hearing when it comes to the present one, when
12 Mr Justice Popplewell noted:

13 "Serious allegations which had only been made after
14 careful consideration and should have been formulated
15 with precision were advanced, but the application was
16 conducted in an entirely inappropriate manner, with the
17 allegations shifting on a regular basis and there were
18 aspects of Mr Dale's witness statement [he was the
19 partner at Mishcon de Reya with the conduct of the case]
20 which mischaracterised the nature of some of the
21 underlying proceedings in a way which was seriously
22 misleading. For example, characterising the
23 record-sharing decision as an unprecedented decision
24 when it was, in its relevant parts, a consent order."

25 And at paragraph 9 he noted that:

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1 "The court should mark its disapproval of the
2 conduct by ordering costs on an indemnity basis."

3 My Lady will know that those costs were never paid
4 because BSGR claim that they regarded themselves as
5 having been the victims of an injustice by the order
6 made against them and decided the appropriate response
7 to that was not to comply with it.

8 Permission to appeal was sought and refused by --
9 refused by Lord Justice Christopher Clarke, page 9 of
10 the same tab, who certified the application as totally
11 without merit, as one sees at the top. And
12 Lord Justice Christopher Clarke I think fully
13 understanding the game that was being played noted at
14 the bottom of page 10 that:

15 "The grant of permission might involve, as may be
16 intended, wholly undesirable disruption of the
17 arbitration process."

18 Now, my Lady, reverting back to the award, the
19 tribunal did confirm the decisions of the previous
20 tribunal, that was paragraph 113 on page 38. What then
21 happened was there was a dispute about when the
22 evidentiary hearing should take place. I'm going to
23 deal with that very briefly, because that is no longer
24 pursued as a live ground. BSGR said it should be fixed
25 for June 2017 because of Mr Wolfson, their desired

1 counsel's availability. The tribunal reserved dates, as
2 one sees from paragraph 115, in February and April 2017
3 for the hearing. That was once said to be evidence of
4 apparent bias, but that is no longer pursued.

5 It is worth noting in passing paragraph 118 and 119,
6 that BSGR also brought a challenge to the tribunal
7 hearing the ICSID dispute, a completely different
8 tribunal. That must be, I think, its third challenge to
9 tribunals in this matter but that challenge was also
10 rejected.

11 Then moving on to para 130 on page 40, it announced
12 that it would not be participating in the merits
13 hearing. So that hearing went ahead without BSGR being
14 present, albeit regular correspondence was put in by
15 BSGR to the tribunal in the course of the hearing.

16 If one goes to para 139, your Ladyship will see
17 various witnesses gave evidence and the first three of
18 those, Souaré, Condé and Nabé, are the three witnesses
19 who were later the subject of BSGR's attempt, after the
20 merits hearing had ended, to adduce evidence of the
21 transcripts of their evidence in the ICSID arbitration.

22 Now, moving forward to para 147, page 43, after the
23 tribunal had closed the record -- and my Lady will know
24 that that is a standard feature of international
25 arbitration in order to bring some finality and mark the

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1 stage when one moves from the process of evidence to the
2 process of deliberation -- they made the standard order
3 that said no further submissions either without the
4 other side's consent or permission of the tribunal.

5 And at para 147 there were various applications.
6 Vale applied to put in exhibits relating to the recent
7 criminal conviction of a former Minister of Mines,
8 Mr Thiam. That was consented to by BSGR, as one sees
9 from para 149. BSGR agreed to Vale's request to amend
10 the submission on costs and to submit three exhibits
11 from the Thiam trial. BSGR also requested to put in
12 material relating to Mr Thiam but in addition
13 transcripts from the ICSID hearing and a forensic expert
14 report which had yet to be produced in the ICSID hearing
15 but which it intended to produce in due course.

16 Now, Vale did not object to the exhibits from
17 Mr Thiam's trial going in. So both sides, by consent
18 and with the consent of the other, put in material
19 relating to Mr Thiam, but Vale did object to the attempt
20 to put in evidence of transcripts from the ICSID
21 arbitration and indeed later to an attempt to put in the
22 closing brief filed by BSGR in the ICSID arbitration.

23 What the tribunal did, at para 152, is say that they
24 would consider that application, they stayed their
25 consideration of it pending their deliberations and

1 preparation of the award. Somewhat similar to the
 2 process one sometimes sees where applications for fresh
 3 evidence in the Court of Appeal are not actually ruled
 4 upon, save as part of the final judgment, allowing
 5 a tribunal to consider all of the evidence, including
 6 the attempt to introduce the fresh evidence, together
 7 and form a view as to its significance and what effect
 8 it might have.

9 Now, Mr Gruder in his skeleton tries to say there is
 10 a contrast between the tribunal allowing Vale's
 11 application to adduce evidence from Mr Thiam's trial and
 12 its ultimate refusal to allow BSGR to adduce transcripts
 13 of the ICSID evidence. But, with respect to my learned
 14 friend, that is a false point in many respects. First,
 15 because BSGR consented to Vale's application the
 16 tribunal did not need to rule on it at all because the
 17 terms of the order closing the proceedings, as one sees
 18 from para 166, on page 47, allowed either party to put
 19 in further material with the consent of the other party.

20 So that, I'm afraid, is a non-point.

21 In any event, each party was allowed, with the
 22 consent of the other, to put in Thiam-related material.

23 Third, because there is just a fundamental
 24 difference between putting in material from a criminal
 25 trial in which neither of the parties were involved,

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1 an attempt by one party to put in transcripts of
 2 cross-examination from a different arbitration to which
 3 Vale were not a party before a different tribunal when
 4 it had had the chance to cross-examine three of those
 5 witnesses in the LCIA arbitration and had refused to
 6 avail itself of that opportunity.

7 Now, in the event, the tribunal decided not to allow
 8 that application to admit the additional material.

9 They were placed, by BSGR's guerrilla tactics, I'm
 10 afraid in a very difficult position, but they dealt with
 11 the matter professionally and fairly throughout. And
 12 one gets a sense of the position they found themselves
 13 in from concluding comments at paras 162 and 163 on
 14 page 46, which I would invite your Ladyship to cast
 15 an eye through. (Pause).

16 MRS JUSTICE MOULDER: Yes.

17 MR FOXTON: My Lady may feel that is a very measured and
 18 professional response to what had been an undoubtedly
 19 ongoing attempt to harass the tribunal and make its life
 20 as difficult as possible.

21 Now, the tribunal's conclusions for not admitting
 22 the material are set out at paras 167 to 169, and once
 23 again I would invite my Lady to read through those
 24 paragraphs. They begin on page 47. (Pause).

25 MRS JUSTICE MOULDER: Yes, I read it yesterday but I've

1 reread this morning.

2 MR FOXTON: My Lady, I'm grateful. Now, we make two points
 3 in relation to that. First of all, that is, we say, on
 4 its face a very clear, fair and wholly rational exercise
 5 of an undoubted procedural discretion, and with respect,
 6 we find it almost impossible to envisage any court or
 7 tribunal having reached the contrary conclusion.

8 But, second, at paragraph 169 the tribunal are
 9 absolutely clear that this material would not have
 10 affected the overall outcome of the arbitration, because
 11 it found multiple misrepresentations by BSGR other than
 12 those that depended upon proof of actual corruption.

13 So even absent a finding of corruption, the tribunal
 14 said they would have reached the same conclusion that
 15 the contract could be set aside and rescinded for
 16 fraudulent misrepresentation by reason of other
 17 misrepresentations made fraudulently by BSGR that did
 18 not depend upon proof of corruption by BSGR.

19 Now, Mr Gruder and Mr Quirk understandably seek to
 20 say whether there had been actual corruption, in
 21 particular in relation to Mamadie Touré, was a critical
 22 and fundamental issue in the arbitration and therefore
 23 if this material is relevant to that it opens the whole
 24 thing up. But with respect to them, it is simply
 25 impossible for them to go behind the very clear

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1 statement of the tribunal to the contrary, and I'm not
 2 going to track through at any length, but if one goes,
 3 for example, to para 676, on page 186, my Lady will see
 4 that there were ten findings of fraudulent
 5 misrepresentations by BSGR, only the tenth of which is
 6 concerned with whether BSGR had actually engaged in
 7 bribery or corruption in relation to benefits granted to
 8 Madame Touré.

9 So absolutely clear that this material would not
 10 have changed the outcome of the arbitration and the
 11 tribunal is not only better placed to make that decision
 12 than anyone else, but that is the tribunal's role to
 13 decide. It is for the tribunal to review the material
 14 in the context of the rest of the evidence and reach
 15 a view on the significance of this material.

16 Now, my Lady with that run-up I then turn to the
 17 principles that govern the exercise of the court's power
 18 to impose conditions under section 70(7) and I don't
 19 think those are substantially in dispute, not least
 20 because I think Mr Quirk and I had an outing relatively
 21 recently before Mr Justice Picken in a case called
 22 Progas on very similar points and I think we're both
 23 content to take the statement of the applicable
 24 principles from there.

25 It is common ground, I think, that in contrast to

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1 a party who attempts to impose condition on a challenge
 2 on jurisdictional grounds under section 67, for
 3 challenges under section 68 the party seeking the
 4 imposition of a condition does not need to show the
 5 challenge is flimsy, but we do say that here it is
 6 flimsy and that is a matter that is relevant to and
 7 informs the court's discretion.

8 Second, we accept on the basis of the current
 9 authorities ~~that the general principle is the court will~~
 10 ~~only order a condition of payment in part of the~~
 11 ~~award when there is a risk established of prejudice to~~
 12 ~~the ability to enforce or recover under the award as~~
 13 ~~a result of the section 68 challenge.~~

14 MRS JUSTICE MOULDER: Sorry, I know there's a transcript
 15 being taken but can you just run that by me again.

16 I note you say it was common ground, I have to say
 17 there were parts of the skeletons where I wasn't clear
 18 that there was common ground between you, so perhaps you
 19 had better just tell me again what you say the general
 20 principle is.

21 MR FOXTON: My Lady, before your Ladyship, because I think
 22 there is an issue as to -- all the cases are first
 23 instance cases I think on this point. Before your
 24 Ladyship ~~we accept that the general principle is that~~
 25 ~~a condition of payment of part of the award into court~~

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1 ~~will only be made if it can be shown that the bringing~~
 2 ~~of the challenge creates a risk of prejudice in~~
 3 ~~enforcing or recovering under the award. It is not~~
 4 meant to be a mechanism for making enforcement easier
 5 than it would have been if there had been no section 68
 6 challenge.

7 MRS JUSTICE MOULDER: Right. So that's not quite the same,
 8 is it, as perhaps how I read the authority? So your --
 9 I mean, Mr Justice Picken -- it might be worth looking
 10 at Mr Justice Picken in Progas because he cites
 11 Sir Jeremy Cooke in Erdenet, and I think it is referred
 12 to in one of the skeletons.

13 MR FOXTON: My Lady, I was going to go to Progas next.

14 MRS JUSTICE MOULDER: All right, that's fine. But as I say
 15 it seems to me it is very important that we understand
 16 what risk or prejudice we're talking about. I mean,
 17 you've just said it creates a risk of prejudice, whereas
 18 Sir Jeremy Cooke, the quotation is:

19 "If the existence of the challenge prejudices the
 20 ability to enforce or diminishes ability to honour the
 21 award."

22 Now, we may be dancing on the head of a pin because
 23 I don't know where I'm going to come out, but it does
 24 seem to me there's a difference between a risk of
 25 prejudice and actual prejudice.

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1 MR FOXTON: Save to this, that he says a risk of dissipation
 2 is prejudice.

3 MRS JUSTICE MOULDER: Well, yes. As I say, it may come down
 4 to the same thing but I think it is quite important that
 5 I know what test you think I'm applying.

6 MR FOXTON: Certainly my Lady. Progas is at tab 40 of the
 7 authorities bundle and I think, as my Lady has probably
 8 seen, Mr Justice Picken quotes fairly extensively from
 9 Mr Justice Flaux and indeed from Sir Jeremy Cooke, so
 10 I was going to use Progas as a sort of portmanteau way
 11 of picking up the position as it appears from more than
 12 one authority.

13 MRS JUSTICE MOULDER: Is there some reason -- I seem to have
 14 two versions of almost every case, is there a reason why
 15 Progas appears twice at 40 and 41?

16 MR FOXTON: There isn't a good reason, my Lady. I think
 17 what has happened is that the parties had used different
 18 forms of case citation in their respective skeletons
 19 when citing the same authority, and I'm afraid those who
 20 prepared the bundle -- and in a sense this lies at my
 21 door of those here today -- thought they were separate
 22 cases when in fact they were the same case.

23 MRS JUSTICE MOULDER: All right. So I'm not looking for any
 24 nuances in the headnotes?

25 MR FOXTON: No.

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1 That does at least have the benefit that the
 2 authorities bundle may be slightly less foreboding than
 3 it first appeared.

4 So I was going to go to the Lloyd's report if my
 5 learned friends are comfortable with that, which is at
 6 tab 40.

7 MRS JUSTICE MOULDER: Right.

8 MR FOXTON: Now, in his summary of the authorities,
 9 Mr Justice Picken first of all went to Mr Justice Flaux
 10 in A v B, and he sets out fairly extensive quotations
 11 from that judgment at para 52 of the judgment in Progas.

12 MRS JUSTICE MOULDER: Yes.

13 MR FOXTON: I don't know whether your Ladyship has had
 14 a chance to read through 47 to 50 internally, as it
 15 were, within para 52, the three quotations from A v B,
 16 for me just to pick up various points once you've had
 17 a chance to look at that. (Pause).

18 MRS JUSTICE MOULDER: Yes.

19 MR FOXTON: In para 47 we pick up the emphasis on risk of
 20 dissipation. The quote from Lord Saville in the DAC
 21 report, the risk of the ability of the losing party to
 22 honour -- the risk that the ability of the losing party
 23 to honour the award made by design or otherwise be
 24 diminished, and then risk of dissipation in 50 as well.
 25 There Mr Justice Flaux also noted:

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1 "... not advisable to lay down hard and fast rules."
 2 But the general principle , and we don't object to
 3 this:

4 "The court should not order security unless the
 5 applicant can demonstrate the challenge will prejudice
 6 its ability to enforce the award."

7 Now, my Lady, the reason that I talk about the loss
 8 of opportunity or the existence of a risk might itself
 9 be treated as a form of prejudice and in relation to
 10 risk of dissipation, that's plainly how the court treats
 11 it. It's not saying that it's not enough to show a risk
 12 of dissipation, you must show actual dissipation will on
 13 the balance of probability or inevitably occur.

14 We say that similarly if there are other events that
 15 may diminish, in Lord Saville 's words, enforcement of
 16 the award, once again we're concerned with establishing
 17 a risk of such prejudice, not least because the court is
 18 looking at a position prospectively where the usual
 19 approach, be it security for costs or freezing orders or
 20 anything else, is assessment of risk rather than
 21 retrospectively , where the court is concerned with
 22 findings on the balance of probabilities of actual
 23 facts .

24 So it is certainly the case that I have applied the
 25 word "risk" to prejudice. That becomes a debate without

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1 a difference if the creation of a risk of diminishing or
 2 dissipating is treated as itself prejudice, but I do
 3 think it is important to note that the court is not
 4 requiring proof on the balance of probability that
 5 something will happen which would not otherwise happen.
 6 The court is concerned with the existence of
 7 a sufficient risk of dissipation of a kind that would
 8 justify a court acting prospectively in, for example,
 9 a freezing order context.

10 So, my Lady, that's what we say about the
 11 terminological debate.

12 MRS JUSTICE MOULDER: Yes, although I think one has to go on
 13 and read what is then said in 53, where
 14 Mr Justice Picken quotes Mr Justice Teare in X v Y,
 15 because I think there are two points there. I mean,
 16 firstly Mr Justice Teare makes the point that:

17 "Section 70 should not be used as a means of
 18 assisting a party to enforce an award."

19 Then he goes on and says:

20 "An order can only be justified if the existence of
 21 the challenges in some way prejudices the ability to
 22 enforce the award or diminishes the ability to honour
 23 the award."

24 Now, I think you're saying the same thing because
 25 I think you're saying other events which may diminish

1 enforcement.

2 MR FOXTON: My Lady, certainly it must be, my Lady, the
 3 existence of the 67 and 68 that creates the risk that
 4 would not exist absent those 67s and 68s. My, I hope
 5 care in using the terminology is simply to draw that
 6 distinction between when a court identifies a risk of
 7 something happening as against when the court makes
 8 findings on the balance of probability that it has
 9 happened or will happen. I don't at all cavil with the
 10 need for the link between the risk and the challenges,
 11 but it is the risk that is the thing, as it were.

12 MRS JUSTICE MOULDER: Yes.

13 MR FOXTON: My Lady, there's then also quotations from
 14 Sir Jeremy Cooke in Erdenet and once again the judge
 15 quotes, I think at para 54, and then there is a summary
 16 of the facts in Erdenet at paragraph 58 and
 17 paragraph 59. We are more than content with that
 18 formulation. We say once again the focus is on risk of
 19 dissipation, risk of diminishing the ability to pay
 20 resulting from the existence of the section -- in our
 21 case section 68 -- challenge.

22 It's quite interesting , looking at the facts of
 23 Erdenet as summarised in paragraph 58, indeed, as to why
 24 Sir Jeremy felt that the order was appropriate:

25 "The lack of any evidence of the claimant's

27

1 financial position or evidence to show security would
 2 stifle the lack of a realistic prospect of enforcement
 3 until the challenges have been resolved ... no assets in
 4 the UK ... accounting irregularities characterised as
 5 financial delinquency -..."

6 And coming on to para 61, quoted by
 7 Mr Justice Picken at 59, the fact that a 49% in
 8 a shareholding in a company had been transferred, and
 9 looking at the last --

10 MRS JUSTICE MOULDER: Yes, I think you're going to get
 11 limited assistance from the facts because I think if we
 12 go into the facts of Erdenet the timing of what was at
 13 issue there is very different from the timing here.
 14 So --

15 MR FOXTON: No, well --

16 MRS JUSTICE MOULDER: -- I'm not sure it is helpful to pick
 17 out those factors unless you want to take me through the
 18 facts of Erdenet because my recollection, reading it
 19 yesterday, was that the timing, as I say, is rather
 20 different .

21 MR FOXTON: There is different timing. I took your Ladyship
 22 to them in part because I wouldn't want to it be said
 23 that I had glossed over those timing differences in the
 24 course of taking your Ladyship to the case. But your
 25 Ladyship is plainly fully alive to those differences and

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1 therefore I can rest assured on that aspect.

2 Now, my Lady, what those cases don't say anything
 3 specific about is what significance one attaches, in
 4 this context, to a section 68 challenge that is flimsy
 5 in its nature. We do say that that is a matter that is
 6 relevant. It's relevant because section 70(7)
 7 ultimately remains a discretionary provision, but also
 8 because if a party that seeks to bring and pursue
 9 an obviously weak and flimsy challenge with a low
 10 prospect of success inevitably raises the issue: well,
 11 what is your purpose in doing that? Now, I don't say
 12 that that on its own is sufficient to raise an inference
 13 that the purpose of bringing the challenge is to buy
 14 time to make enforcement more difficult, but it is
 15 certainly a matter which in conjunction with other
 16 material we say can support that conclusion.

17 My Lady, thirdly, because it can be seen here as
 18 part of a persistent course of conduct going right back
 19 to the start of the arbitration in which it is clear
 20 BSGR is doing everything it can to prevent Vale
 21 obtaining relief for the wrong it has suffered.

22 MRS JUSTICE MOULDER: Well, we're obviously going to come on
 23 to that but no doubt it's going to be said that life is
 24 a very different now because the company is in
 25 administration.

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1 MR FOXTON: That is and will be said and, my Lady, alas the
 2 reality on the ground is not anything like as different
 3 as the formality of putting the company into
 4 administration might suggest.

5 So, my Lady, I was then going to turn -- I deal very
 6 briefly with this with the merits of the challenge.
 7 We've got those in bundle 3 at tab 11. I think beginning
 8 at page 6. My Lady, we have the fact that of the four
 9 matters in that paragraph 7 initially relied upon --

10 MRS JUSTICE MOULDER: Sorry, I missed the cross reference.
 11 I was just thinking about a point and got distracted.

12 MR FOXTON: Yes, it is volume 3 of the bundles, tab 11,
 13 page 6. (Pause).

14 Three of those four challenges have gone, so we only
 15 have number 1 left, the refusal to admit the hearing
 16 transcript and post-hearing brief from the ICSID case.
 17 I've in a sense taken your Ladyship to the material, we
 18 do suggest that the attempt to suggest that that
 19 represents apparent bias is an absolutely hopeless
 20 submission. It's overwhelmingly likely that any court
 21 in the same position would have reached the same
 22 outcome, and in any event the test is not whether the
 23 court do something differently but have the arbitrators
 24 acted in a sense in a way so far outside what might have
 25 been expected that the very high threshold for court

1 intervention is triggered.

2 So we do say that that is hopeless.

3 There is also then --

4 MRS JUSTICE MOULDER: I'm sorry, what's bothering me is if
 5 you have to show that there is a risk of dissipation or
 6 diminution, how does the merits of the case affect that?
 7 I mean, if I -- I accept I'm not applying balance of
 8 probabilities, but I'm trying to work out whether or not
 9 there's a risk of dissipation or diminution. How is
 10 that affected by the merits of the challenge? I don't
 11 think I follow that.

12 MR FOXTON: Well, my Lady, that was the point, I --

13 MRS JUSTICE MOULDER: I know you say well, there's
 14 a discretion so you just throw it into the mix, but
 15 I don't understand where it could affect where I am
 16 setting the bar for risk.

17 MR FOXTON: The submission went a little further than that,
 18 my Lady, because we make two points --

19 MRS JUSTICE MOULDER: All right, I obviously haven't grasped
 20 it then.

21 MR FOXTON: The first is that a party who brings
 22 an obviously hopeless application inevitably raises the
 23 issue: what is the purpose of this if not to try and, as
 24 it were, kick the can down the road in order to allow
 25 an opportunity to make enforcement more difficult?

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1 Now, I don't say that on its own that factor could
 2 be decisive but I do say that it is a factor that can be
 3 weighed in the balance with other factors when deciding
 4 whether the risk of the adverse consequence flowing from
 5 the section 68 application has been made out.

6 My Lady, the second ground is it evidences, we say,
 7 a continued course of conduct, and this is where your
 8 Ladyship came back to me and said well, it has all
 9 changed with the administrators, and I will come back to
 10 that. But a party who is absolutely determined to do
 11 everything it can to frustrate Vale's recovery or
 12 vindication of the loss it suffered as a result of the
 13 fraudulent misrepresentation, and that is a mindset or
 14 an attitude that does raise a greater risk of
 15 dissipation and prejudice during the period in which the
 16 section 68 application is live.

17 Now, my Lady, the only other matter relied upon is
 18 a suggestion that the tribunal failed to deal with
 19 an argument that was raised. I'm going to look over and
 20 ask Mr Gruder whether this really is live as a point.

21 MR GRUDER: Do you mean the frustration argument? No.

22 MR FOXTON: So the frustration point is not live so in fact
 23 now we're then down from five original complaints to
 24 one, and my Lady will see why we find echoes of
 25 Mr Justice Popplewell's comments back in 2017 coming

1 back.

2 Now, my Lady, given that, I then want to turn to why
 3 we say that the threshold for identifying a risk of
 4 dissipation or diminishing of the ability of BSGR to pay
 5 or of Vale to recover as a result of the existence of
 6 the section 68 challenge is made out here.

7 Now, my Lady, if this were an application for
 8 a freezing order and that analogy is drawn as we've seen
 9 in some of the cases, drawn by Mr Justice Picken in
 10 Progas, for example, I start from a case in which
 11 a tribunal of highly experienced arbitrators in
 12 an extremely thorough award has found that BSGR made
 13 repeated dishonest representations and that BSGR moved
 14 companies around between different ownership chains to
 15 assist in carrying out its deceptions. And also BSGR
 16 went to great lengths to conceal matters from Vale.

17 So if one considers the freezing order application
 18 coming to the court, we would be starting in that
 19 context from an extremely strong base of a party
 20 persistently found to have engaged in dishonesty and
 21 manipulation of the ownership chains of assets to
 22 perpetrate that dishonesty.

23 Second, BSGR has been found guilty of serious
 24 corruption by the Government of Guinea and similar
 25 findings by the tribunal, and BSGR's principal,

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1 Mr Steinmetz, has been indicted in Switzerland on
 2 charges of corruption and forgery.

3 In considering the suggestion it's all the
 4 administrators now and not BSGR, my Lady should know
 5 that BSGR's solicitors have refused to confirm whether
 6 they are still in contact with Mr Steinmetz.

7 My Lady, third, the tribunal found that \$500 million
 8 had been paid to BSGR in 2010 as a result of fraud and
 9 it rescinded the contract under which that \$500 million
 10 was paid. Now, the result of that is it is open to Vale
 11 to seek to trace those proceeds into the hands of those
 12 who receive them and, of course, if money was paid out
 13 of BSGR at a stage when it had contingent exposures as
 14 a result of its dishonesty, BSGR itself would have
 15 remedies for the benefits of its creditors against those
 16 to whom the money has been paid.

17 Now, my Lady, if one asks whether the existence of
 18 the challenge application has made the vindication of
 19 those rights more difficult, we would say the answer is
 20 clearly yes. First of all, BSGR is using the challenge
 21 application as a basis for resisting the enforcement of
 22 the award in the US. It has even gone as far as to
 23 argue in the US that by reason of bringing the challenge
 24 the award has been suspended under the laws of the
 25 United Kingdom.

1 Now, that I'm afraid is simply a completely false
 2 statement of English law and one which Mr Gruder and
 3 Mr Quirk would never have associated themselves with.
 4 But the result is anyway that their application to
 5 resist enforcement has led to the -- has gone off, as it
 6 were, to be determined and is pending determination now,
 7 so it has been successful in buying time.

8 Secondly, ~~the existence of the challenge application~~
 9 ~~renders it impractical for Vale to wind up BSGR and~~
 10 ~~pursue the remedies that would be available to BSGR~~
 11 ~~itself against directors, shareholders and others who~~
 12 ~~had received monies out of BSGR, because inevitably BSGR~~
 13 ~~would contend that so long as there's a prospect of the~~
 14 ~~award being set aside, no winding-up order should be~~
 15 ~~made.~~

16 Now, my Lady, in addition we do say there is
 17 evidence of BSGR dissipating assets. The 500 million
 18 paid in 2010 was immediately moved out of BSGR to
 19 a Liechtenstein family trust, who distributed it to --
 20 at least to the extent we have visibility -- related
 21 entities and companies.

22 Now, Mr Gruder says that happened before any
 23 allegations of bribery were made but by definition it
 24 happened at a stage when BSGR knew of its own conduct in
 25 bribing and knew of its own conduct in giving dishonest

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1 answers to Vale in the context of the due diligence.

2 So we say there is a strong inference that moving
 3 the 500 million out at that stage was intended to make
 4 enforcement more difficult, if ever these matters came
 5 to light.

6 And there is no proper explanation for why this was
 7 done. There's been a suggestion from Mr Libson in
 8 evidence that some of these amounts were paid in
 9 repayment of indirect loans from the foundation. We
 10 asked for the loan documents and we were refused.

11 In addition, we say there is strong evidence that
 12 during the arbitration BSGR took steps to make
 13 enforcement more difficult. My Lady, for that we need
 14 to go to Mr Kelly's witness statement in bundle 1 at
 15 tab 3. (Pause).

16 My Lady, it's paragraph 26. So paragraph 26(a),
 17 this happened in 2015, shares in BSGR's subsidiary Octea
 18 were charged to a Bermudan company called Star West as
 19 security for I think effectively contingent liability
 20 under a guarantee for a loan. So there was a charge
 21 there to Star West in 2015.

22 What is said to be a claim open to BSGR against
 23 Mr George Soros has been secured in favour of a company
 24 called Litigation Solutions Limited, 26(b). Now,
 25 despite its name, we are not aware of any bona fide

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1 litigation funder of that name, and my Lady will see
 2 from sub-paragraph (c) that we believe these companies,
 3 Litigation Solutions Limited and Star West, are
 4 connected because they have common directors and there's
 5 also a link between Star West and a company called
 6 Global Special Opportunities, which is a shareholder in
 7 Niron, a company that now stands to benefit from the
 8 concessions in Guinea as a result of a settlement
 9 arrangement -- I will come back to the status of it in
 10 due course -- with Guinea, which was announced I think
 11 at some point in the course of this year.

12 So we very much lay down the gauntlet that we
 13 believe all of these companies are linked. What do we
 14 get in response? Effectively there is no attempt to
 15 engage in that material at all. If one goes to
 16 Mr Libson on this, tab 5 of the same bundle, page 9,
 17 there is in paragraph 14 simply a refusal to engage.

18 Now, my Lady, the third matter, and I would hope to
 19 be able to deal with it in perhaps -- I don't know
 20 whether your Ladyship would be willing to then have
 21 a short break for the transcript writers?

22 MRS JUSTICE MOULDER: I think we should, yes.

23 MR FOXTON: My Lady, the third matter is covered relatively
 24 extensively in the skeleton, which is the settlement of
 25 the claim in the ICSID arbitration, where my Lady may

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1 have seen that in February of this year BSGR's parent,
 2 Nysco and the Government of Guinea announced the
 3 settlement of their dispute. And the announcement said
 4 that a new group of investors presented by and including
 5 Mr Steinmetz will exploit the deposit in their place.

6 So one has there what appears to be a very
 7 significant, on its own case, asset of BSGR being the
 8 subject of highly relevant agreement between Nysco, its
 9 parent and Guinea, Mr Steinmetz being involved in
 10 relation to the so-called new investors coming in to
 11 take the benefit, and that all appears to have been done
 12 with no or minimal involvement from the administrators.

13 I'm just going to pick this up very briefly at
 14 bundle 2, tab 10, page 104.

15 MRS JUSTICE MOULDER: I'm sorry, what was the reference
 16 again?

17 MR FOXTON: Bundle 2, my Lady, tab 10, at page 104.
 18 (Pause).

19 My Lady, what happened on 1 March, in the third
 20 paragraph, we were told that the parties, and I think
 21 that means BSGR and the Government of Guinea, although
 22 clearly BSGR's shareholders were also closely involved
 23 in this, provisionally agreed terms for a settlement
 24 that would involve an entity known as Niron Metals being
 25 granted a concession of one of the mines and then

1 entering into a revenue-sharing arrangement under which
 2 BSGR would be paid an agreed proportion of the revenues
 3 of that concession. And there's reference in that
 4 paragraph to the need for due diligence to be performed
 5 by the administrators, and the administrators take the
 6 position that this is not a binding settlement because
 7 the terms of it, as it were, are subject to contract.
 8 But my Lady will see at the bottom of the page that they
 9 were provided with the signed term sheet on
 10 24 February --

11 MRS JUSTICE MOULDER: Sorry, I'm not sure I'm on the right
 12 page. Can you give me the page reference again?

13 MR FOXTON: My Lady, it's the large number, 104, at the
 14 bottom of the page. It should be the first page of
 15 a letter from BDO.

16 MRS JUSTICE MOULDER: Sorry, I was out by a page. I'm
 17 looking at the wrong ...

18 MR FOXTON: No, the numbers are, alas, different but very
 19 close to each other, which never helps.

20 MRS JUSTICE MOULDER: Right.

21 MR FOXTON: Perhaps I could ask my Lady to read the third
 22 and fourth paragraphs on page 104. (Pause).

23 MRS JUSTICE MOULDER: Yes.

24 MR FOXTON: So, my Lady, just a couple of points briefly to
 25 pick up on this. The first is although apparently the

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1 administrators have done due diligence or are going to
 2 be doing due diligence on Niron, they have refused to
 3 engage with our queries as to who beneficially lies
 4 behind Niron and what role Mr Steinmetz has in relation
 5 to it. Certainly the press releases would suggest that
 6 he clearly is involved in this, and my Lady will well
 7 understand our concern that the effect of this
 8 settlement, leaving its legal status aside for the
 9 moment, is that those against whom claims would
 10 undoubtedly lie and who are very closely linked with the
 11 dishonesty the tribunal has found will be benefiting
 12 from the proposed deal with the Government of Guinea,
 13 and as at the moment no indication at all as to how it
 14 is BSGR will benefit from this arrangement.

15 My Lady, secondly, although it is said by the
 16 administrators and is still said by them this is all
 17 subject to contract and nothing has changed, the reality
 18 is that on the ground things are changing. The
 19 Government of Guinea and Nysco have announced this
 20 settlement as though it is a done deal. That press
 21 release is at bundle 1, tab 7, page 70. The words "done
 22 deal" are not mine, they come from a Nysco statement as
 23 reported by The Sunday Times.

24 And, my Lady, the Government of Guinea has already
 25 launched a tender for the award of the new mining

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1 rights. One sees that in bundle 2, tab 10, page 94.
 2 One has the tender notice and the Government of Guinea
 3 saying:

4 "To reach a full amicable agreement in March 2019
 5 the Republic of Guinea and BSGR finally ended their
 6 dispute before the ICSID and the blocks are now in the
 7 portfolio of the state free of any dispute."

8 So whatever the position may be in terms of paper,
 9 the reality is that the events on the grounds are moving
 10 fast and the administrators' ability to influence or
 11 control them is plainly non-existent.

12 My Lady, I don't know if that would be a convenient
 13 moment?

14 MRS JUSTICE MOULDER: Well, yes, I don't know to what
 15 extent you're going to come back on this but it seems to
 16 me that Mr Kelly -- and I'm looking at his third witness
 17 statement -- makes a number of statements which indicate
 18 that he doesn't seem to believe what Mr Cohen is saying,
 19 and so even if you're right that practically Guinea has
 20 launched a tender or things are moving on, what Mr Cohen
 21 says is, "Well, we're getting something in return".

22 Now, as I say, I don't know to what extent you're
 23 going to take me through this, but it seems to me that
 24 I have evidence saying, "Well, yes, this may be
 25 happening or is happening, we're negotiating it, but we

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1 are the administrators and we are negotiating something
 2 in return". Now, as I say, Mr Kelly makes a number of
 3 quite striking assertions that he doesn't believe a word
 4 of what Mr Cohen is saying and I don't know, as I say,
 5 whether you intend to rely on that evidence or pursue
 6 it, but I'm not sure that it's enough to say, well,
 7 practically these rights are being mined if in fact
 8 something is being received in return.

9 MR FOXTON: Nothing is being received now, that is not
 10 Mr Cohen's evidence. He says, "We are negotiating" --

11 MRS JUSTICE MOULDER: Yes, he doesn't -- well, as I say,
 12 I think we should have the break now but I don't read
 13 this as Mr Cohen saying, "Oh yes, terribly sorry, we
 14 seem to have given away an asset here". Mr Cohen says,
 15 "We are administrators. We act in the best interests of
 16 the company and the creditors", and although he doesn't
 17 say, "guess what", he says, "We don't go around giving
 18 away assets". In effect he says, "We are going to get
 19 something back".

20 Now, as I say, Mr Kelly says effectively, "I don't
 21 believe a word of it". I leave it to you as to whether
 22 or not that was actually --

23 MR FOXTON: Well, my Lady, I don't accept that --

24 MRS JUSTICE MOULDER: -- the case that you're pursuing.

25 MR FOXTON: -- I don't accept that characterisation of

1 Mr Kelly's evidence --

2 MRS JUSTICE MOULDER: As I say perhaps we should look at
 3 it -- I think we should take the break now but Mr Kelly
 4 certainly seems to make --

5 MR FOXTON: -- and I will come back to that.

6 MRS JUSTICE MOULDER: -- some quite surprising statements.

7 MR FOXTON: Well, they are in response to very surprising
 8 statements by Mr Cohen, my Lady.

9 MRS JUSTICE MOULDER: As I say, if you want to go there but
 10 I don't think we can just ignore it.

11 MR FOXTON: No, I will certainly go there to the extent to
 12 which I put the matters to your Ladyship and they do not
 13 involve --

14 MRS JUSTICE MOULDER: As I say, what I'm putting to you, the
 15 reason I am raising it is not that I -- it's up to you,
 16 obviously how you put your case. But you are saying to
 17 me this asset has gone, look at the press releases,
 18 Guinea are now going out to tender. That's dissipation,
 19 or risk of dissipation. What I am saying to you is you
 20 cannot, I would have thought, just ignore the fact that
 21 there is evidence from Mr Cohen saying this is not
 22 a case of the asset just going, there is something being
 23 received in return.

24 MR FOXTON: No. Well, I'm not ignoring it, my Lady, but one
 25 can only make the submissions in sequence so I will come

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1 back to that after the break.

2 MRS JUSTICE MOULDER: Fine. We will take ten minutes.

3 Thank you.

4 (11.49 am)

(A short break)

5 (11.59 am)

7 MRS JUSTICE MOULDER: Yes, Mr Foxton.

8 MR FOXTON: So, my Lady, just coming back to the settlement
 9 of the ICSID tribunal, the first point is of course the
 10 entire structure was apparently negotiated by management
 11 and Guinea without the administrators' involvement. The
 12 administrator tells us that on 24 February, I think,
 13 they are presented with the draft terms of settlement
 14 and told, "That's it, non-negotiable".

15 Secondly, it's quite clear that the terms of any
 16 revenue-sharing agreement by which BSGR would get
 17 anything out of this have yet to be agreed. That was
 18 the position as confirmed by the administrators on
 19 27 March this year and we have had nothing through from
 20 BSGR or the administrators to suggest that matters have
 21 moved on in relation to revenue-sharing.

22 The problem is matters are moving on on the ground
 23 in relation to the concession, and so saying, "Well, we
 24 will do a deal in which we will get something back yet
 25 to be determined", does not address the fundamental

1 difficulty that the ability to roll any of this back if
 2 no acceptable deal is offered is being compromised by
 3 the speed with which events are actually moving on the
 4 ground in relation to the concessions.

5 My Lady, the third point is this: the structure of
 6 the deal involves at least an indeterminate part, and we
 7 don't know of the value of any settlement going off to
 8 a different entity other than the creditors, namely the
 9 new investor. And we have no knowledge, but a good deal
 10 of suspicion, that part of the benefit will be going to
 11 those involved in the management of the company and
 12 indeed those closely involved in the matters that have
 13 given rise to such serious findings by the tribunal and
 14 investigations by others. The existence of the
 15 administration and the administrators has been powerless
 16 to prevent that state of affairs coming into existence.

17 My Lady --

18 MRS JUSTICE MOULDER: So when Mr Cohen says:

19 "No binding deal had been reached, and none would be
 20 reached without the joint administrators being satisfied
 21 that such a deal is overall in the best interests of
 22 BSGR and its creditors."

23 You say that's not right?

24 MR FOXTON: No, I'm saying whether there is a binding deal
 25 as a matter of contract or not alas does not answer the

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1 question, because meanwhile Guinea, and indeed BSGR's
 2 shareholders in their announcements and the new
 3 investor, are all charging on regardless.

4 MRS JUSTICE MOULDER: Yes, but the second half of that
 5 sentence states:

6 "... none would be reached without the joint
 7 administrators being satisfied that such a deal is
 8 overall in the best interests of BSGR and its
 9 creditors."

10 Now, whether or not payments are going off to third
 11 parties, whether or not they are connected parties, I'm
 12 not sure what you say to the fact that the
 13 administrators say even if we -- well, they do say,
 14 "Yes, we were given this deal. No, we didn't get any
 15 involvement in negotiating it, but we wouldn't have done
 16 it if we weren't satisfied it was in the best
 17 interests". So are you asking me to say that the
 18 administrators are mistaken?

19 MR FOXTON: Well, they haven't done the deal yet. The
 20 administrators don't say they have committed themselves
 21 to anything as yet. They are saying, "We will not do
 22 a deal unless we are satisfied", and I take them at
 23 their word on that. The problem is their statement, "We
 24 will not do a deal in the future", does not change the
 25 fact that the new investor is currently working away and

1 all that not doing a deal would achieve is BSGR not
 2 getting any revenue share. It's not going to be able to
 3 change what's actually happening on the ground at the
 4 mines and who is extracting economic benefit from them
 5 in Guinea.

6 The problem is the administrators' focus on the
 7 status of the settlement document as regards BSGR does
 8 not answer our concern that regardless of that state of
 9 affairs, the people in control of the position on the
 10 ground are moving on as though that is not a significant
 11 threshold that needs to be crossed before anything
 12 happens.

13 Now, if that's right, all that the administrators'
 14 refusal to do a deal would achieve is BSGR not getting
 15 the revenue share of the revenue that the new investors
 16 were making from this.

17 My Lady, one suspects, although I understand why
 18 they don't go into this, that the administrators would
 19 far rather have been involved in all these discussions
 20 with Guinea while they were going on, rather than simply
 21 being presented with a term sheet at the end of February
 22 and told, "That's it".

23 MRS JUSTICE MOULDER: And the fact that they say:

24 "We would be entitled to recommence the ICSID
 25 arbitration at our discretion if a binding agreement

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1 appropriately benefiting BSGR and its creditors is not
 2 reached."

3 You take no comfort from that either?

4 MR FOXTON: Well, the problem is certainly a world in which
 5 the concessions might be reinstated will have been
 6 fundamentally changed if someone else is in there on the
 7 ground, and to the extent to which management who may be
 8 crucial elements in supporting and giving evidence at
 9 that hearing are in fact deriving benefits under the new
 10 arrangements, it's hardly conducive to a world in which
 11 that arbitration will be --

12 MR GRUDER: My learned friend is in fact mistaken. There is
 13 no further evidence to be given in the ICSID
 14 arbitration. The evidence has finished. All that is
 15 awaited is an award but the arbitrators have been told
 16 to suspend work on that pending a possible settlement.

17 MR FOXTON: Well, my Lady, if that award comes out and says,
 18 "You can have the concession back", how, in practical
 19 terms can that ever be accomplished if in reality new
 20 investors are in on the ground exploiting the
 21 concession, having been asked to tender by the
 22 Government of Guinea on the basis that there's been
 23 a deal done between BSGR's parent, Nysco and the
 24 Government of Guinea, and these blocks are now entirely
 25 free of third-party claims?

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1 I'm afraid sometimes you cannot get the wine back in
 2 the bottle, and that is the reality of the position that
 3 the administrators, through no fault of their own, were
 4 presented with when handed this term sheet at the end of
 5 February.

6 Now, my Lady, in relation to just -- before I finish
 7 there's one other matter I should pick up, and
 8 Mr Gruder's rising to his feet just now reminds me of
 9 it, that in the break we were told that he had misspoken
 10 and in fact the failure to deal with the frustration
 11 point is not being abandoned, so I'm afraid that we have
 12 another flip-flop back on that point. I think the
 13 fastest on record in relation to BSGR's positions to
 14 date.

15 Now, my Lady, in relation to other matters on the
 16 administration, first of all, the fact that they were
 17 put in, in the words of one of BSGR's directors,
 18 Mr Cramer, "To put sharks in the moat and make sure BSGR
 19 can stay the distance on the arbitration and litigation
 20 even if there are adverse awards or developments", is
 21 not a particularly encouraging position for a creditor
 22 of BSGR to be faced with.

23 My Lady will have seen the funding arrangements of
 24 the administration give Nysco, the shareholder
 25 effectively owned by Mr Steinmetz and his Liechtenstein

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1 foundation, extensive practical control over what is
 2 done because they have to approve the budget, approve
 3 drawdowns and approve the purpose for which funds will
 4 be used.

5 And the drawdown requests have to be sent to
 6 a Mr Bonnant who is Mr Steinmetz's personal Swiss lawyer
 7 and friend. So, my Lady, the result of that is the
 8 terms on which the administration have been established
 9 give Mr Steinmetz, give Nysco, extensive influence over
 10 what will be done and the result of that is the
 11 administrators are never going to be an effective means
 12 of pursuing claims against the management of BSGR or
 13 parties related to Mr Steinmetz or Nysco in respect of
 14 any benefits that they have received. That is simply
 15 an inevitable product --

16 MRS JUSTICE MOULDER: So, back to the beginning, how does
 17 the fact that you say the administrators are not
 18 an effective means of pursuing claims link with a risk
 19 of dissipation arising from the challenge? Because it's
 20 the case in all administrations that the administrators
 21 can only act to the extent that they are funded, but the
 22 administrators are very clear, at least in their own
 23 evidence -- it appears to be challenged in yours -- that
 24 they are taking the decisions and at the end of the day
 25 it is their decision whether something is in the best

1 interests of the creditors.

2 So I'm not sure that I have followed the link
 3 between what you say are the limitations on the
 4 administrators and how those limitations, which, as
 5 I say, appear to me to apply to all administrations,
 6 mean that this challenge is giving rise to a risk of
 7 diminution.

8 MR FOXTON: My Lady, for these reasons. First of all, as
 9 I mentioned at the outset, but for the challenge we
 10 could wind up BSGR. One could appoint receivers by way
 11 of equitable execution over its assets. So instead of
 12 part -- administrators being funded by and subject to
 13 financial control by Mr Steinmetz and Nysco, you would
 14 have parties in control of the claims of BSGR or in
 15 control of its assets that would not be subject to those
 16 constraints.

17 And, my Lady, secondly, the distinguishing feature
 18 of the funding arrangement here is the fact that those
 19 with their hands on the purse strings are very closely
 20 linked, or in some cases the same as, individuals about
 21 whose conduct there is very serious cause for concern.

22 In relation to Mr Steinmetz obviously the criminal
 23 investigations of him. But also in relation simply to
 24 the whole underlying factual strata of bribery and
 25 fraudulent misrepresentation, my Lady, I would suggest

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1 that a situation in which those funding the
 2 administration are the most credible third party against
 3 whom potential claims might be brought is far from
 4 a routine aspect of administrations, in my experience.

5 So, my Lady, in broad terms that is why we say that
 6 the section 70(7) criteria are met here. I should just
 7 deal with one other point, ~~we are not by this relief~~
~~seeking to leapfrog other creditors. I don't know if~~
~~there are any other substantial creditors, but in any~~
~~event we accept that it would be open to the English~~
~~courts to decide how any funds paid as a condition of~~
~~any order should be distributed to avoid Vale obtaining~~
~~any inappropriate advantage in the context of~~
~~an eventual insolvency.~~

15 So we are not looking to advance our position.
 16 We're simply looking to preserve it from the detriment
 17 that would otherwise follow.

18 My Lady, that leaves, in terms of my applications,
 19 security for costs, where the issue is principally one
 20 of quantum.

21 Now, our estimate is in bundle 1, tab 7, pages 86 to
 22 88. (Pause).

23 My Lady, the total estimate is \$885,000. It's on
 24 page 88. But we have made it clear the amount of
 25 security that we seek is 80% of that figure, which is

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1 \$710,000. We are not seeking 100% security.

2 Now, my Lady, the first point we make is that there
 3 is a real prospect here of indemnity costs being ordered
 4 if this challenge fails, and where prospect of indemnity
 5 costs is reasonable rather than speculative, the
 6 appropriate perspective from which to view security is
 7 the amount that would be recovered when costs are
 8 ordered on an indemnity basis. We do so against the
 9 background of the prior history of BSGR's failed
 10 challenges to many tribunals, the seriousness of the
 11 challenges that have been made and abandoned and in due
 12 course the fact that the frustration defence is
 13 advanced, then abandoned, then advanced again within the
 14 space of a few moments.

15 So we do say that the prospect of indemnity costs
 16 are high. At the hearing before Mr Justice Popplewell
 17 we recovered about 87% of our costs on an indemnity
 18 basis.

19 BSGR suggests the appropriate figure is \$511,000 or
 20 about 58% of the amount claimed. Now, if we are right
 21 that security should be assessed on the assumption
 22 there's a reasonable prospect of indemnity costs, that
 23 in itself would involve a very significant uplift to be
 24 BSGR's figure. But in any event we say that this is
 25 clearly a huge underlying claim, \$2 billion now

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1 including interest, a case with an incredibly lengthy
 2 procedural history -- arbitrations started in 2014 --
 3 numerous decisions, prior court applications that are
 4 going to be part of both parties' evidence, and in those
 5 circumstances it is a matter for which significant
 6 solicitor time in relation to preparation and filing of
 7 evidence is appropriate.

8 The rates that Mishcon de Reya are charging BSGR are
 9 significantly below current market rates and, my Lady,
 10 taking those matters together, and it is one of those
 11 issues I think I approach with a broad brush, not with
 12 any lack of respect for the points but I sometimes think
 13 that courts may be more interested in the highlight
 14 issues than delving into detail, but the figure of
 15 security we have put forward is a reasonable one that
 16 I would invite your Ladyship to order.

17 So, my Lady, that I think is all I wanted to say in
 18 relation to our applications, and I will obviously
 19 respond to BSGR's applications after you've heard from
 20 Mr Gruder.

21 MRS JUSTICE MOULDER: Thank you.

22 Submissions by MR GRUDER

23 MR GRUDER: My Lady, I will deal with my learned friend's
 24 applications in the same order he put them forward.

25 Now, my Lady has already looked at Progas and

1 I won't go to that again but there are a number of
 2 principles which come from that, that you are looking
 3 for prejudice arising from the challenge. So you're
 4 only looking for prejudice from the date of the
 5 challenge until the date of the hearing, which in this
 6 case is from May until November of this year.

7 Secondly, it's not prejudice that the challenge may
 8 delay enforcement and the purpose of the right under
 9 section 77 or the court's power is not to make it easier
 10 for the claimant to enforce the award or to provide
 11 security for the award as a general rule. The real
 12 question on the facts of the case and the way the
 13 authorities go is has my learned friend been able to
 14 show that there is a risk of dissipation equivalent to
 15 the requirement for an asset freezing injunction? Well,
 16 either from May -- it doesn't really matter -- or indeed
 17 from today until November?

18 Of course, so much is made by my learned friend as
 19 to the findings in the award, the so-called -- what he
 20 calls "guerrilla tactics", which I will possibly deal
 21 with later, and the conduct of the previous -- of the
 22 management, those previously in control of the company.

23 But we say that if we are looking at a test which is
 24 looking at the position from the date of the application
 25 earlier this year until the end of November, when it's

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1 the hearing, of course my Lady knows that it's not the
 2 previous management who have got power to act for the
 3 company, it's not the previous management who have got
 4 control of the assets of the company, it is the
 5 administrators and the administrators are people of
 6 experience, repute and integrity who are leading
 7 administrators working for one of the leading
 8 accountancy firms in this country.

9 It is significant that although my learned friend
 10 seeks to justify some of the imputations -- in my
 11 respectful submission, scandalous imputations -- in
 12 Mr Kelly's third witness statement, if one looks at what
 13 they say in their skeleton argument, their skeleton
 14 argument expressly disclaims any imputation as to the
 15 conduct or the bona fides of the administrators, and
 16 that's obviously correct.

17 Then if one just, as a brief overview, looks at the
 18 two assets which Vale focus on, the first asset is the
 19 settlement of the ICSID arbitration.

20 Now, if one looks at what is, if they are right, the
 21 value of that claim in the arbitration, because they, of
 22 course, argued in the arbitration and at the moment have
 23 got an award which says that this concession was
 24 obtained by bribery and corruption. And that is the
 25 basis upon which the Guinea authorities stripped the

1 company of its concession and that is the matter which
 2 was litigated or was arbitrated in the ICSID
 3 arbitration.

4 If Vale are right, if the arbitration award is
 5 correct, the ICSID arbitration, which is said to be
 6 an asset of such value that it has been dissipated by
 7 this settlement, is actually valueless, because the
 8 stripping of the company of the right to the concession
 9 was actually justified. Therefore, on one view of the
 10 matter the settlement or the draft settlement or any
 11 settlement of that ICSID arbitration which provides
 12 value for the creditors of the company is not
 13 a detriment to those creditors, but a benefit, because
 14 on Vale's own case that claim is valueless, or virtually
 15 valueless.

16 Secondly, the Soros arbitration. The Soros
 17 arbitration is something which Mr Kelly makes fun of.
 18 He says, and I'm not necessarily quoting directly, it's
 19 a sort of hobby horse of Mr Steinmetz, where he treats
 20 it slightly contemptuously. It is something which BSGR
 21 asked Vale to help them finance and to co-operate in
 22 that claim. Vale refused. So what BSGR have done, they
 23 have a got a litigation funder to fund it on the basis
 24 of a 50% recovery. Vale didn't want to finance it.
 25 Vale laugh at this claim and yet for the purpose of this

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1 application they seek to say that funding it on the
 2 basis of a 50% share to the funder, whoever that funder
 3 is, is stripping the company of its assets. Again, one
 4 should look at what they say with a certain amount of
 5 common sense, with all due respect.

6 Then they then say, "Well, why would a party seek to
 7 bring a section 68 other than to provide an opportunity
 8 to somehow dissipate its assets?" With due respect, any
 9 commercial company, any administrators, or indeed
 10 company management, if a company is not in
 11 administration, who are on the receiving end of
 12 a \$2 billion award against them, and if they are told
 13 there is a reasonable prospect of success -- even if my
 14 learned friend is right, which we don't agree, there's
 15 a flimsy prospect of success, where the costs will be,
 16 in comparison to the 2 billion award, fairly minimal--
 17 of course any sensible management would pursue
 18 that avenue. In my respectful submission, my learned
 19 friend is really barking up the wrong tree and really
 20 making a misconceived application. So merely to make
 21 the section 68 application, merely to exercise a right
 22 available to you under the Arbitration Act, is itself
 23 evidence of an intention to dissipate.

24 If one looks at this, the position is that we are
 25 dealing with a company under the control of

1 administrators. A duty of an administrator, the role of
 2 an administrator, is to get in the assets for the
 3 purpose of the creditors, to act in a bona fide way for
 4 the benefit of those creditors and the benefit of the
 5 company. And in my respectful submission, this is what
 6 these administrators are doing and it is paragraph 56 of
 7 Vale's skeleton, where they say:

8 "The management of BSGR are the type of people who
 9 will do everything in their power to prevent
 10 enforcement."

11 But not the administrators.

12 So we are dealing -- it is paragraph 56 of their
 13 skeleton on page 28 of their skeleton:

14 "The evidence shows that BSGR's management,
 15 excluding the administrators and owners, are precisely
 16 the sort of people who will do everything in their power
 17 to prevent Vale obtaining the sums awarded it to by the
 18 tribunal."

19 So the people who are in control of the company and
 20 have the power, and have had power since 2018, to act on
 21 behalf of the company are not the sort of people who
 22 would do everything in their power to prevent Vale
 23 obtaining the sums awarded to it by the tribunal. That
 24 is their case.

25 So how can it be that they can then seek to put

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1 forward submissions before you, and Mr Kelly can seek to
 2 make those serious allegations in witness statement
 3 number 3, when they themselves say that the
 4 administrators are not those type of people?

5 Now, if I can come to deal with some of the other
 6 points my learned friend makes, both in his skeleton and
 7 orally, he talks -- a lot of play is made about the
 8 conduct of the arbitration, the guerrilla tactics. With
 9 due respect, whether my learned friend is right or
 10 wrong, and we do not accept that that's the position, he
 11 is making imputations about those who were in control
 12 and had power to act on behalf of the company before the
 13 administration. The administrators, including Mr Cohen,
 14 only came to control the company and had power to act
 15 for the company in 2018.

16 The award was not at that point out, but effectively
 17 the arbitration or at least the evidential part of the
 18 arbitration was over and the arbitrators were
 19 deliberating, as they had for two years, over the award.

20 Then there's a reference to Mr Justice Popplewell's
 21 order, the fact that the costs have not been paid.
 22 Again, that is something which was done. These
 23 applications were made under the control of the
 24 management before the administrators were there. Again,
 25 my learned friend made some play about the movement

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1 upstream in 2010 of the 500 million paid by Vale to
 2 BSGR. There are a number of points on that. Again,
 3 that pre-dated the involvement of the administrators by
 4 eight years. But we also say that, with all due
 5 respect, the idea that these monies were moved
 6 immediately after Vale paid the 500 million, because the
 7 management of BSGR were -- could have foreseen
 8 circumstances in which the President would die, then
 9 there would be a new President who would then strip them
 10 of their concessions and that would then lead at some
 11 point in the future to Vale bringing a claim in fraud
 12 against BSGR, with due respect, is very far-fetched.

13 Then one has the reference my learned friend said to
 14 the shares in Octea, which owns a diamond mine in
 15 Sierra Leone. They were -- and in Libson, paragraph 2,
 16 the second witness statement of Libson,
 17 paragraph 13(b)(i). That was a diamond mine in
 18 Sierra Leone where the shares were previously charged to
 19 Standard Chartered. The bank subsequently sold its debt
 20 to Star West Investments. Again, this pre-dated the
 21 arbitration, let alone the section 68 application.

22 Then it's then said, well, the directors still
 23 control BSGR or have some involvement. Mr Cohen has
 24 made absolutely clear on oath that the directors do not
 25 exercise control over BSGR, and he says at A4/10:

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1 "These amount to serious allegations against the
 2 joint administrators which are entirely unsupported and
 3 should not have been made."

4 Then one then has the position about the settlement.
 5 Now, the settlement is not a final settlement, and that
 6 is the evidence of Mr Cohen and one has a term sheet
 7 which my learned friend didn't take you to at bundle 2,
 8 tab 10, page 77. And on page 77 it sets out the parties
 9 and at 1.3:

10 "The parties recognise that a comprehensive and
 11 equitable settlement of the dispute is in the best
 12 interest of all parties. Parties waive the claims
 13 expressed in procedure and ... are pleased to work
 14 together to enable development of a world-class mining
 15 project to profit the people of Guinea. The people of
 16 Guinea decides the valuation of its mineral resources,
 17 in particular iron, to improve the living condition of
 18 the population."

19 Then if one goes to 1.5:

20 "If the general terms and conditions presented in
 21 this document are accepted, the parties will prepare
 22 a transaction with a view to formalising their
 23 agreement."

24 And then at 2.2:

25 "As a prior condition to any agreement, BSGR must

1 provide the evidence that it has the power and authority
 2 required to conclude this agreement with the Republic of
 3 Guinea and that the prior approval of jurisdictions of
 4 Guinea or the -- Guernsey or the administrators of BSGR
 5 Guinea Ltd will not be required."

6 Then 2.4:

7 "In return that the Republic of Guinea request the
 8 BSGR adviser to prevent a new investor."

9 So this is a term sheet. It is not binding. It's
 10 not going to be agreed to by the administrators unless
 11 they regard the overall transaction, the overall
 12 settlement, as in the best interests of the creditors.
 13 They expressly say that there will be a -- any approval
 14 will be subject to the sanction of the Royal Court of
 15 Guernsey, and then my learned friend says, "ah", he
 16 says, there appear to be from press releases activities
 17 on the ground and it may not be -- one may not be able
 18 to roll back those activities. With all due respect,
 19 that's not correct because if one takes a step
 20 backwards, BSGR at the moment don't have any rights to
 21 any mines in Guinea. Those rights were stripped from
 22 the joint venture company by the decision of the Guinea
 23 government. That led to the ICSID arbitration. The
 24 ICSID arbitration was then heard and the process has
 25 been suspended pending the agreement.

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1 If the agreement doesn't go ahead, the rolling back
 2 will not be BSGR effectively mining the concession, it
 3 will be BSGR reviving the ICSID arbitration which will
 4 not really incur any cost, or minimal cost, because all
 5 the evidence and the argument is over, it will just be
 6 the arbitrators continuing or reviving, if I can put it
 7 that way, their deliberations.

8 That would then, if BSGR's case is a good one, lead
 9 to an award in their favour or, if Vale's allegations
 10 are correct, lead to an award against them.

11 My learned friend then says, well, there's all these
 12 potential claims against the previous management or the
 13 previous controllers of BSGR and, of course, Nysco,
 14 which finances the administrators, is very unlikely to
 15 finance a claim against Mr Steinmetz or those who were
 16 in control of the company previously.

17 Now, the funding agreement does not prevent -- does
 18 not prevent the administrators getting funding from
 19 other sources for other claims, and, indeed, the
 20 administrators have said to Vale, "If you want us to
 21 pursue claims against the previous management, are you
 22 willing to fund it?" The answer was no, they were not
 23 willing to fund it. So it ill lies in their mouth,
 24 having been approached to and been requested as to their
 25 willingness to fund these claims, to say that the

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1 arbitrators -- sorry, the administrators can't pursue
2 these claims because they are being funded by Nysco.

3 So, again, with all due respect, we can see that
4 many of the points here are manufactured, if I can put
5 it this way, in order to justify a claim for security
6 the purpose of which is to stifle a section 68
7 application.

8 And of course any rights that there may be in the --
9 in relation to the ICSID arbitration, any settlement,
10 are not prejudiced until the agreement is actually
11 binding and approved by the court. As I've said before,
12 that will not happen -- that has not happened. That
13 will not happen unless the administrators consider the
14 agreement to be in the best interests of the company and
15 it's approved by the court.

16 Now, these administrators, some of the evidence and
17 some of the submissions seek to imply that they are
18 really parties of the previous management.

19 Now, these are people -- a firm, BDO, who are
20 extremely well known and with all due respect people
21 like Mr Cohen and his co-administrator, with many
22 decades, probably 30 years of experience, are not going
23 to prejudice their reputation and are not going to
24 prostitute their integrity merely for the sake of
25 pleasing the previous management for the sake of

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1 whatever fees they may have got or may possibly get for
2 this administration. With due respect, that, I would
3 submit, is not a submission which should be -- which
4 should be given credence.

5 So if one looks -- and I should show you briefly the
6 funding agreement, since I've made submissions on that.
7 That's at volume 2, at page 107. I'm sorry, I think --
8 sorry, page 26. (Pause).

9 The particular provision I would like to show you is
10 2.6:

11 "Notwithstanding the purposes of the facilities, the
12 parent is not directly engaging the administrators and
13 this agreement does not seek to replace the statutory
14 requirements or any commonly accepted industry guidance
15 relating to the conduct in administrations of this
16 nature generally. The parent hereby agrees and
17 acknowledges that nothing in this agreement or in the
18 arrangements contemplated by it shall fetter or
19 prejudice the administrators' statutory duties and
20 obligations."

21 So at the end of the day, if they decide that they
22 want to or they think it's proper to pursue the previous
23 management, then if they can get funding for that they
24 will do so.

25 Now, there are numerous points which are made in the

1 skeleton which Mr Foxton never necessarily adumbrated
2 orally, or at least didn't stress orally. But, for
3 example, it's then said, well, there are 268 hours in
4 the budget per year, or in the previous year -- I think
5 from 2018 to 2019 -- for meetings with the former
6 management.

7 Now, that equates to 22 hours per month and for the
8 administrators and their staff to deal with and talk to
9 and get information from the previous management who
10 have got obviously a greater familiarity with the
11 activities of the company and the background to the
12 dispute and so on is in no way excessive.

13 I think they seem to -- they put it forward as eight
14 weeks as if it is something unbelievable, but if you
15 really look at 22 hours per month, that, in my
16 submission, is entirely reasonable.

17 We say on this application that BSGR is in
18 administration. Its joint administrators' role is to
19 bring in and preserve assets for the sake of the company
20 and its creditors. That is the very opposite of
21 dissipation. And we say Mr Kelly's attempts to cast
22 aspersions on Mr Cohen are without any merit whatsoever.

23 Furthermore, we say if I'm wrong on this,
24 500 million, how is that amount justified? How do
25 they -- they say, well, it's sort of a reasonable

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1 estimate. Surely if the purpose of security is to
2 protect a claimant who is the beneficiary of
3 an arbitration award against dissipation, the amount of
4 security should bear some relationship to the value of
5 the assets which might be dissipated.

6 So, for example, if one has a party which has
7 an award against it for \$10 million but the evidence
8 shows that it doesn't have any more than \$250,000, and
9 suppose the evidence shows that that asset, let's say
10 it's a sum of money in a bank account, might be
11 dissipated because the evidence shows that the people in
12 control of the company are dishonest and are the type of
13 people who might dissipate their assets, then the
14 maximum the court should actually award as security
15 should be the amount of the money which might be
16 dissipated.

17 Now, there is no evidence here that 500 million,
18 with all due respect, is in jeopardy at all. If one
19 actually looks at the assets which people have focused
20 on, there's the ICSID arbitration which -- with all due
21 respect, there really is no risk of it being dissipated
22 within the next two and a half months, and the Soros
23 claim, which Mr Kelly treats as a joke.

24 So, with due respect, there is no relationship --
25 even if there was power to grant security under

1 section 70(7), which in my submission there isn't, the
 2 court should not do so, consistent with the authorities,
 3 there is no relationship between the power and the
 4 amount of money the other side want.

5 So in my submission my learned friend completely
 6 fails on that ground.

7 We say that actually what is the true purpose of
 8 this? Obviously, it's intended to stifle the section 68
 9 application or provide security for the award, both of
 10 which, on the authorities, are not legitimate purposes.

11 So then it's then said, although I see my learned
 12 friend didn't pursue it orally, well, they should have
 13 under section 70(7) security, well, for the Popplewell
 14 costs order or the LCIA deposits which we didn't pay.

15 We say that again is a totally illegitimate
 16 application. The only power given to the court is the
 17 power given under section 70(7):

18 "The court may order that any money payable under
 19 the award shall be brought into court or otherwise
 20 secured."

21 There's no power to say, well, they have been
 22 naughty boys because two years ago they didn't pay
 23 a costs award on a challenge, order them to bring that
 24 into court as a condition of pursuing their section 68.
 25 That's not legitimate.

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1 There is also another point about the LCIA deposits
 2 which we've dealt with in our skeleton.

3 So that's what we say about that.

4 If I can just deal with perhaps one or two points on
 5 the merits of the application, although I would submit
 6 that -- my learned friend says it's flimsy. Well, with
 7 due respect, I accept that when a party is seeking
 8 security for section -- for -- security when another --
 9 when the unsuccessful party in an arbitration is making
 10 an application under section 68, it is not necessary for
 11 him to prove that the section 68 application is flimsy.
 12 It's only necessary for him to prove that a section 67
 13 application is flimsy if an application is made under
 14 that section.

15 But at the end of the day, whether our application
 16 is flimsy or stronger than flimsy is actually
 17 irrelevant, because if this were a section 67
 18 application, which it is not, there would be two
 19 requirements. One, for Mr Foxton to show my application
 20 is flimsy and, two, to satisfy the test in Progas about
 21 dissipation of assets and so on.

22 Now, if, in a section 67 application -- even though
 23 a party shows the application is flimsy, he still has to
 24 satisfy, if I can call it this for shorthand, the
 25 dissipation test. Where does it get my learned friend

1 to seek to show that the application in this case is
 2 flimsy? Because it's not a requirement and he's still
 3 got to satisfy the dissipation test.

4 The dissipation test cannot be satisfied here for
 5 all the reasons which I have put forward.

6 And in our skeleton we set out in some detail why we
 7 say that this is a justified section 68 application. We
 8 say that in fact if one looks -- one, it was always the
 9 case that bribery and corruption was at the centre of
 10 this arbitration, and I'm not going to deal with this
 11 for long because it's frankly noise and prejudice which
 12 the other side is seeking to put forward to obfuscate
 13 the true legal test for security. But, for example, if
 14 one goes to the first witness statement of Mr Kelly and
 15 go at Kelly 1 at paragraph 31, which is I think
 16 bundle C--- or section C, which is tab 13 at page 10.
 17 I think one finds that in volume 3.

18 So it's volume 3, tab 13, page 10. Mr Kelly says
 19 this, paragraph 31:

20 "The LCIA tribunal found that BSGR was liable for
 21 fraudulent misrepresentation. It found that BSGR had
 22 engaged in the deliberate concealment of its
 23 arrangements with an entity called Pentler Holdings, of
 24 which Madame Touré, the wife of a former President of
 25 Guinea, President Condé, was a shareholder, because BSGR

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1 wished to ensure that Vale remained ignorant of Pentler
 2 and its dealings with the various contacts who have
 3 assisted BSGR Guinea in obtaining the mining rights.

4 "Further, the LCIA tribunal found that Pentler, and
 5 therefore Madame Touré, had received shares from BSGR in
 6 order to secure her influence over President Condé. In
 7 short, the LCIA tribunal found that BSGR had bribed
 8 Madame Touré and then lied to Vale about it."

9 Now, that's how Mr Kelly, in his first witness
 10 statement, sworn well after the award, summarises the
 11 case.

12 Now, it's of course said now, "Ah, but we were found
 13 guilty of fraudulent misrepresentation on grounds which
 14 were not directly related to bribery but to indicia of
 15 bribery, or red flags relating to bribery. That's what
 16 it comes to."

17 But if one -- we say that the tribunal's decision as
 18 to dishonesty, because it's not enough to show that we
 19 made misrepresentations, but the tribunal's decision
 20 as -- that they were fraudulent is effectively affected
 21 be their decision on bribery and corruption.

22 Of course, the ICSID transcripts, which we wanted to
 23 put in and which we were refused, are transcripts that
 24 go directly -- and we've set it out in our skeleton, and
 25 I'm not going to repeat it -- directly to the issue of

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1 bribery and corruption.

2 It's one thing to say, "Ah, the Thiam evidence was
3 put in with the consent of both parties". It was. But
4 of course the Thiam evidence related to criminal
5 proceedings to which neither party was present, and the
6 tribunal never saw any problem in evaluating that in the
7 context of the evidence which they had.

8 But when we tried to put in evidence which went
9 directly to the question of bribery and corruption, they
10 never made a ruling, despite us asking them to deal with
11 it. They never made a ruling for effectively nearly two
12 years until they came out with their final award and
13 then decided not to admit the evidence.

Now, my learned friend's case is, ah, well it doesn't matter whether you're right or wrong because you would have lost anyway on other points. And we disagree with that because of what I've said about dishonesty and the fact that they found dishonesty based upon the fact that we were the type of people who would corrupt the Guinea government and therefore had something to hide.

Now, also I think my learned friend accepts or my learned friend says, well, there is no substantial injustice , he says, because the decision would be the same, but on other grounds, even if you're right .

²⁵ He does accept in his skeleton argument that if

1 a section 68 application, "Well, it doesn't matter that
2 the arbitrators didn't allow in evidence which might
3 exculpate you on a charge of dishonesty because you
4 would have lost on a strict contractual basis anyway"?

Now, of course we say that there would in those circumstances be a substantial injustice and they, well, does it substantially affect your rights? But we say that's not the test.

9 But of course, our primary case is that if this
0 evidence had been allowed in -- and we say it was
1 totally wrong not to allow it in -- we might well have
2 been found innocent of bribery and corruption and that
3 would have affected their conclusion on whether we --
4 whether the misrepresentations were put forward
5 dishonestly, or at the very least would have affected
6 their decision on costs, because their decision on costs
7 was expressly -- paragraph 994 of the award expressly
8 relied upon the findings of the tribunal regarding
9 bribery, and costs were I think 16 million.

If I can stop there, my Lady, I've virtually finished security for the claim. I'll go on to security for costs and then my application under section 66.

MRS JUSTICE MOULDER: All right. Thank you very much.

4 We'll come back at 2 o'clock, please.

\rightarrow (1.01 pm)

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1 a party -- if the tribunal is in breach of natural
2 justice, then that itself is a serious irregularity.

The other point I would wish to make is that in our respectful submission section 68 requires the serious irregularity to cause substantial injustice to the applicant. Not the same test as one has under section 69 that the serious -- that -- in section 69 the test is does it -- does the error of law substantially affect the rights of the parties? In my respectful submission, there is a difference in those cases because, of course, a party -- a prominent businessman and company in the mining field which is found guilty of bribery and corruption, because the arbitrators have not allowed in evidence which would exculpate them, suffers a substantial injustice. Its not enough for the other side to say, "Well, you would have a lost anyway".

If I can give my Lady an example. Supposing a judge was involved in an arbitration and there was a claim made that the judge was liable on two grounds: one, fraud and dishonesty and, secondly, strict contractual obligation. Supposing the tribunal so misconducted itself that it refused to allow in evidence which would or might exculpate the judge from the charge of dishonesty. Is it sufficient for the winning party to say to the judge when he comes in front of the court on

1 (The luncheon adjournment)

2 (2.00 pm)

3 MR GRUDER: My Lady, apart from three very short points,
4 I've finished with security for the claim point and the
5 points are this. One, we are dealing with a period
6 of two and a half months.

7 Secondly, the company doesn't have any liquid
8 assets. That's why it's got to borrow funding or the
9 administrators have got to borrow money to fund their
0 operations and the exercise all of their duties.

1 Thirdly, when it comes to the settlement, the
2 question the administrators have got to ask themselves
3 is: is the overall package in the best interests of the
4 company and its creditors? If part of the package gives
5 benefits to other parties like Niron, or Mr Foxton says
6 Mr Steinmetz, that's part of their assessment.

7 So those are my submissions on security for the
8 claim. I come to security for costs and --

9 MRS JUSTICE MOULDER: Sorry, just before you do, you say,
0 "No liquid assets". I had gathered from the skeletons
1 that you weren't running an argument that the claim
2 would be stifled and I think the point had been taken
3 that there was no evidence as to what other sources of
4 funding were there. So I'm not quite sure when you say,
5 "No liquid assets" --

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1 MR GRUDER: Well, the administrators have got no -- there is
 2 no liquid assets. That point goes much more to the risk
 3 of dissipation rather than the --

4 MRS JUSTICE MOULDER: I see.

5 MR GRUDER: -- stifling. We don't take a stifling point,
 6 because there isn't evidence before the court as to --

7 MRS JUSTICE MOULDER: Right, thank you.

8 MR GRUDER: -- the wherewithal of other people.

9 So if we can come to the question of security for
 10 costs, we deal with this in paragraphs 30 and following
 11 of our skeleton, and the issue really has boiled --
 12 although the other side claim 880,000-odd, they now
 13 claim 710,000 and we say it's 51,445 [sic]. I'm not
 14 going to repeat all the submissions we have made. My
 15 Lady has obviously read them.

16 The point I would like to do is at page 17 of our
 17 skeleton, paragraph 37, we break down the 885,000 which
 18 the other side originally claimed and upon which the
 19 710,000 is based and one sees the solicitors' estimate,
 20 so estimated for the future, between now and November,
 21 \$347,000.

22 We comment on that in paragraph 39. So they
 23 estimate that their solicitors -- 530.5 hours of
 24 solicitors' time between now and the challenge
 25 application in November, for the matters we set out

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1 there.

2 Now 530.5 hours in respect of an application where
 3 the evidence is there, it's before the court, is, we
 4 say, grossly excessive. And I would just -- I know
 5 perhaps it's almost an unspoken convention not to
 6 comment on counsel's fees, but it has not escaped -- it
 7 wouldn't escape my Lady's attention that a 45-page
 8 skeleton was put in by the other side. The first 20
 9 pages of that skeleton effectively rehearsed arguments
 10 which will be made by the other side on the section 68.
 11 By the Commercial Court practice, they are only entitled
 12 to put in a 25-page skeleton argument.

13 Now, they broke that direction and perhaps one can
 14 excuse them. We don't take a point on that at the
 15 moment, but one can excuse them, because there were
 16 a number of applications today, although we managed to
 17 keep our skeleton within the 25 pages.

18 The point I'm really saying is they are seeking
 19 a further \$365,000 security for counsel's fees and one
 20 asks oneself has not at least a substantial proportion
 21 of that work already been done for the purpose of
 22 putting in a lengthy introduction trying to persuade my
 23 Lady how weak our challenge is? That's the only point
 24 I make, that there must be, with all due respect, very
 25 substantial duplication between the costs that have

1 already been incurred for today and the costs that they
 2 say will be incurred for the November hearing. So
 3 that's the points I make on the security for costs.

4 Application by MR GRUDER

5 MR GRUDER: If I can then come to my application, which is
 6 the section 66 application, and one needs to, I think,
 7 go to Mr Justice Bryan's order which one finds at
 8 bundle 5, tab 19. I think it's necessary for one to
 9 just put it in context, one sees the order that was
 10 obtained without notice, perfectly properly, at page 1
 11 of tab 19. Then on page 2 they gave the claimant
 12 permission under section 66 of the Arbitration Act to
 13 enforce the award in the same manner as a judgment and
 14 so on, and then 2:

15 "Permission having been granted under section 66(1)
 16 as aforesaid, the claimant may later request the
 17 judgment be entered into."

18 Then 3:

19 "The defendant has the right pursuant to
 20 CPR 62.18(9)(a) within 14 days after service of the
 21 order to apply to set it aside."

22 Which we in fact did.

23 Then 4:

24 "Pursuant to the provisions of CPR 62.18(9)(b) the
 25 award must not be enforced until after the end of the

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1 14-day period, or, if an application is made by the
 2 defendant within that period, to set aside this
 3 order ..."

4 And that application was set aside:

5 "... until after that application has been finally
 6 disposed of."

7 Now, I would like my Lady mentally to draw a line
 8 under the words, "finally disposed of", because that's
 9 important. And those words -- what the order does is
 10 track in terms the wording of CPR 62.18(9) which one
 11 finds at Part 2 of the White Book, 712, and
 12 effectively -- I mean, if it's easy for my Lady to look
 13 at it. But in fact the words of paragraph 4 of
 14 Mr Justice Bryan's order mirror the wording of
 15 CPR 18(9)(b):

16 "The award must not be in force until after the end
 17 of that period --"

18 That's the 14 days:

19 "... or any application made by the defendant within
 20 that period has been finally disposed of."

21 Now, our application to set aside or stay the order
 22 of Mr Justice Bryan stands and falls on exactly the same
 23 grounds as our section 68 application, which will be
 24 heard in November, namely those grounds which are set
 25 out in the section 68 application.

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1 If we're correct that there was a serious
 2 irregularity giving rise to substantial injustice such
 3 that the award should be set aside, we say the
 4 enforcement order -- the order of Mr Justice Bryan has
 5 got no independent existence if the award upon which it
 6 is based is set aside.

7 However, by -- it is Vale's argument that they
 8 should be permitted to enforce the award effectively
 9 from today even if in two and a half months' time, as
 10 a result of the hearing on 27/28 November, the award is
 11 set aside or remitted. That's their argument.

12 Now, one asks oneself if in fact, as a final order,
 13 because what this court would do today would inter-
 14 partes make the order or confirm the order which
 15 Mr Justice Bryan made on an ex parte basis back in
 16 May -- what would the court then do, if one sees -- in
 17 November if we succeed on the section 68?

18 Because if the award has gone, because it's been set
 19 aside, then there will be nothing to enforce and that
 20 would then make a nonsense of the order which the court
 21 makes today.

22 On the other hand, if my Lady sets aside
 23 Mr Justice Bryan's order, that again would be a final
 24 order. If it turns out we lose in November, will, by
 25 some process of resurrection, the order be revived or

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1 will there be another order? So we say that in fact the
 2 right way of dealing with this is to stay the order
 3 pending the hearing of the section 68 application,
 4 because in fact the application can't be finally
 5 disposed of until one knows what actually happened -- or
 6 will happen to the section 68 application, because --

7 MRS JUSTICE MOULDER: Mr Gruder, if that was the case that
 8 would be the position on every judgment which is sought
 9 to be appealed and it's not the case.

10 MR GRUDER: No, but this is not --

11 MRS JUSTICE MOULDER: So there's no conceptual difficulty.
 12 This is what happens -- I've no idea what the
 13 percentages are but there's certainly no automatic stay
 14 if a judgment is to be appealed; even if the court
 15 grants permission there is no automatic stay.

16 MR GRUDER: Well -- but this is not -- this is not
 17 an appeal, this is a challenge to the integrity of the
 18 award. I quite accept that if one has a judgment and
 19 there is an appeal, then of course unless there is some
 20 other order, a stay of execution or something of that
 21 kind, then of course the judgment stands, I accept that.
 22 The appeal is not an automatic stay in itself.

23 But in fact, CPR 69 and the terms of the order
 24 effectively says the order cannot be in force until, if
 25 one takes the wording of the order, the application has

1 been "finally disposed of". Can you -- and I ask
 2 rhetorically, how can you finally dispose of an order to
 3 set aside Mr Justice Bryan's order until you know
 4 whether the arbitration award upon which it's based is
 5 finally going to be held to be a valid one or not? It
 6 is provisionally valid, I accept it's provisionally
 7 valid, of course, but in fact the application to set
 8 aside the ex parte order, the without notice order, is
 9 completely hand in glove with the section 68
 10 application. If one -- one at the moment has got
 11 an arbitration award which is *prima facie* valid --
 12 I accept it's *prima facie* -- but it's subject to
 13 a section 68 application. You've got an application to
 14 set aside a without notice order of Mr Justice Bryan
 15 which is based upon the fact our case that the -- our
 16 case that the award shall be set aside under section 68.

17 Now, if you're finally going to confirm that order
 18 and supposing we succeed in November, it is difficult to
 19 see how you can then effectively say, well, it now
 20 appears that we were wrong to grant -- to confirm the
 21 order, the order of -- this is not -- what the other
 22 side are seeking is not some provisional life for the
 23 Bryan order, they're seeking a final order.

24 In my respectful submission, you can't do that until
 25 you know that the challenge has failed or succeeded. So

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1 in my respectful submission the right way of dealing
 2 with it is to stay the order of Mr Justice Bryan pending
 3 the section 68, where that -- where the whole issue of
 4 the validity of the award, and in my respectful
 5 submission the validity of the without notice order
 6 under section 66, will be finally determined.

7 MRS JUSTICE MOULDER: I don't think that -- whilst
 8 I understand the argument you're advancing about it
 9 being provisionally valid on the wording of the section,
 10 I'm not aware of any authority that would support it and
 11 looking at Russell, which was included in the bundle, at
 12 8/10 that doesn't appear to be the approach which
 13 Russell said was the result of the language.

14 MR GRUDER: Well, there is one authority which I would want
 15 put before my Lady, which is the judgment of
 16 Mr Justice Eder in *Y v S* at tab 28 of the authorities
 17 bundle.

18 MRS JUSTICE MOULDER: I'm sorry, tab 28?

19 MR GRUDER: Tab 28.

20 MRS JUSTICE MOULDER: Thank you.

21 MR GRUDER: If I can ask -- sorry -- if I can ask my Lady
 22 possibly to look at the facts in the headnote at
 23 page 703. (Pause).

24 MRS JUSTICE MOULDER: Yes.

25 MR GRUDER: And then -- well, if I can go to paragraph 23 on

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1 page 709 and one sees Mr Justice Eder saying:

2 "It is important to understand that the application
3 made by Mr MacLean under this head on behalf of S is
4 that the court should now make an unrestricted final
5 order granting leave to enforce the award in the same
6 manner as a judgment or order of the court, ie before
7 disposal of Y's pending section 67 challenge which,
8 following a recent directions hearing by
9 Mr Justice Flaux, is now fixed for a four-day hearing."

10 And that in a way -- well, effectively although it's
11 section 67, it is what the other side are asking for
12 today.

13 24:

14 "In essence Mr ..."

15 And then he sets out in paragraph 24 Mr Diwan's
16 arguments, and then at paragraph 25 he says:

17 "In the course of the argument relating to this
18 application there was much debate as to whether
19 CPR 62.18 provides an exclusive code for the enforcement
20 of arbitration awards. If an application is made for
21 leave to enforce an award pursuant thereto, where the
22 court is in effect inevitably bound to make an order as
23 stipulated CPR 62.18, ie prohibiting enforcement pro tem
24 where the court might be able to vary or suspend the
25 terms of the order so as to require respondent to put up

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1 security ..."

2 We will come to that a bit later, because that's the
3 other side's fallback position.

4 If I can then go to paragraph 30 on 709:

5 The second point also concerns the formulation of
6 paragraph 2 of this suggested draft order. Following
7 the structure of CPR 62.18(9) the prohibition against
8 taking steps to enforce is normally linked to
9 a potential future application to set aside the order
10 for leave to enforce. Here I recognise an application
11 under section 67 has already been issued and this
12 explains the wording suggested by Mr Diwan. However, in
13 my view, and subject to any further submission from
14 counsel, appropriate wording should be as follows ..."

15 And he sets it out.

16 Then he then sets out 1, 2, 3 and says:

17 "No doubt the application to set aside may refer to
18 the existing section 67 application and/or the same
19 grounds, but it seems to me this wording is more
20 appropriate because it follows the structure of 62.18."

21 And then one goes to -- the next question is
22 security and then in 32 -- I ought to deal -- since I'm
23 on this case I ought to deal with the security point,
24 because that's, as I said, the other side's argument,
25 that even if we're right, there should be security:

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1 "In principle I see much force in this argument,
2 however it's not clear to me how such an argument fits
3 in with the overall scheme of CPR 62.18, including in
4 particular 62.18(9) or how the approach of the court on
5 the question of provision of security ... fits in with
6 the approach of the court under section 77 ..."

7 He refers to Konkola:

8 "Further, contrary to ... (Reading to the words)... I
9 was not persuaded to arrive at any decisions for
10 Article 6."

11 And then he says:

12 "Sadly the time allowed for the present hearing (two
13 hours including judgment) was insufficient to permit
14 proper consideration of the argument. Unfortunate
15 because it raises a point of some considerable practical
16 importance. My tentative view is CPR 62.18(9) speaks
17 for itself, ie in principle a successful party's prima
18 facie entitled to an order nisi granting leave to
19 enforce an arbitration order as prescribed by
20 CPR 62.18(9). But if an application to set aside such
21 an order is issued, then subject possibly to
22 a counterstrike application, the award must not be
23 enforced until such application is disposed of. There's
24 nothing in CPR 62.18 that contemplates that such
25 temporary prohibition against enforcement may be made

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1 subject to an order of security."

2 So this is -- we're coming to it:

3 "As it seems to me it is also consistent with the
4 decision of this court in IPCO at paragraph 20, where an
5 enforcement order was held to be defective.
6 Section 70(7) only applies to sections 67, 68 and 69 of
7 the 1996 Act. It does not apply to any application for
8 leave to enforce under section 66 of the 1996 Act.
9 Consistent with section 70(7), it seems to me that any
10 application for an order requiring provision of security
11 of the amount in the dispute must be made in the context
12 of a discrete application under sections 67, 68 and 69."

13 Then I think probably that's where I can leave it.

14 Now, in my respectful submission, and in particular
15 that passage at the bottom of paragraph 30, where the
16 judge says:

17 "No doubt the application to set aside may refer to
18 the existing section 67 application and/or the same
19 grounds ..."

20 He is contemplating, in my submission, that the
21 matter is not -- the application cannot be finally
22 disposed of until there is final disposal of the -- in
23 that case section 67 application but in this case the
24 section 68 application. And I would respectfully submit
25 that that's the sensible matter because otherwise you

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1 would have an order either an ex parte order set aside
 2 and then revived or an ex parte order confirmed finally
 3 and then two months later that order is then effectively
 4 subverted by a further order setting aside the
 5 arbitration award under section 68.

6 In fact Vale come close, at least to some extent, in
 7 accepting this, because if one looks at paragraph 43 of
 8 their application -- of their skeleton argument, they
 9 say this:

10 "Fourth, where a party has a pending challenge to
 11 the award the correct approach is not to set aside the
 12 enforcement order but to consider whether to grant
 13 a stay of enforcement pending the hearing of that
 14 challenge. And, if so, on what terms. This is the
 15 approach described in the leading works on arbitration
 16 and applied in Socadec."

17 Now, we accept that the right way of looking at it
 18 and the way to deal with this is to decide whether it
 19 should be stayed, but we part company on the submission
 20 that the court should order security or indeed the court
 21 has any power to order security because of what
 22 Mr Justice Eder said in Y v S.

23 What's more, his decision in Y v S is consistent
 24 with the decision of the Supreme Court. It's not on
 25 section 70(7). It's not on section 68. In IPOCO

1 than await the outcome of Nigerian proceedings the issue
 2 whether fraud was an answer to enforcement raised
 3 an issue of public policy under section 103 should be
 4 decided in the English courts and further enforcement
 5 awards should be adjourned under section 103(5) on
 6 condition the defendant provides security of
 7 100 million ..."

8 That's the important part of it for our purposes.
 9 And one sees the holding, if I can ask my Lady possibly
 10 to read the holding at the bottom of the headnote.
 11 (Pause).

12 And if then I can make one or two submissions and
 13 perhaps show my Lady perhaps one or two passages.

14 MRS JUSTICE MOULDER: Yes.

15 MR GRUDER: One sees what the Supreme Court is saying is
 16 section 103(5) of the Arbitration Act provides security
 17 might be ordered where there was an adjournment within
 18 its terms, but there was nothing in section 103(3) which
 19 provided that a court could make its decision under that
 20 provision conditional upon the provision of security.

21 And effectively the reason is, we would submit,
 22 analogous to Mr Justice Eder's reasoning that if there
 23 is an express power to order security, as there is under
 24 section 70(7), then the court can't then, when it's
 25 dealing with section 66 and dealing with -- if the court

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1 (Nigeria) v Nigerian National Petroleum Corp, which one
 2 finds at tab 33 of the authorities bundle.

3 Now, this is a very -- a case with a very long
 4 history and if one looks at the headnote at page 970,
 5 what in fact happened was there was an arbitration in
 6 Nigeria with an award of \$152 million and the claimants
 7 sought to enforce the award through the English courts
 8 under Part 3 of the Arbitration Act:

9 "Parties agreed by consent order to adjourn the
 10 English enforcement proceedings under section 103(5) of
 11 the 1996 Act pending resolution of a challenge to the
 12 award brought by the defendant in the Nigerian courts.
 13 The defendant agreed to pay certain undisputed sums into
 14 court as security. The defendant subsequently became
 15 aware of evidence the claimant had secured the
 16 arbitration award by way of fraud and amended its
 17 pleading in Nigeria accordingly. The claimant
 18 unsuccessfully applied to set aside the consent
 19 agreement and force the arbitration award in England on
 20 the basis that delays to the Nigerian proceedings
 21 amounted to a change of circumstances. The Court of
 22 Appeal allowed the claimant to appeal, holding that the
 23 fraud allegation itself amounted to a change of
 24 circumstances which justified lifting the stay of
 25 English enforcement proceedings in order that rather

1 decides to stay a challenge to a without notice
 2 section 66 judgment it can't then seek to order security
 3 as a condition of that stay.

4 And one sees -- well, one sees section 103 quoted in
 5 detail at paragraph 14 of the judgment and one -- the
 6 passage I relied upon is actually a very short one.
 7 It's in paragraph 24. What Lord Mance says is:

8 "In both these respects the Court of Appeal fell, in
 9 my opinion, into error. First, nothing in
 10 section 103(2) or 103(3) or in the underlying provisions
 11 of Article 5 of the New York Convention provides that
 12 an enforcing court may make the decision of an issue
 13 raised under either subsection conditional upon the
 14 provision of security in respect of the award. In this
 15 respect, there is a marked contrast with section 103(5),
 16 which specifically provides that security may be ordered
 17 where there is an adjournment within its terms."

18 And we say, yes, there is an express power under
 19 section 70(7) but one can't then seek to imply powers
 20 which the court might have when there are provisions in
 21 this -- in the Arbitration Act which provides for the
 22 possibility of security in appropriate circumstances
 23 where there's a challenge under section 68 or
 24 section 67. But there's nothing which makes
 25 an application to set aside or stay a without notice

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1 judgment under section 66, subject to security. So in
 2 our respectful submission we submit that Mr Justice Eder
 3 was right and it's supported by IPCO (Nigeria).

4 Now, there are some other submissions my learned
 5 friend has made and so, for example, if I can go to
 6 paragraph 42.1 of his skeleton, one sees this. He says,
 7 third, he says:

8 "An award debtor cannot oppose enforcement on the
 9 basis that the award was tainted by a serious
 10 irregularity."

11 Now, the facts that those judgments are dealing with
 12 are totally different types of facts. They've got
 13 nothing to do with section 66 and the terms upon which
 14 the court -- whether the court should discharge or
 15 should stay a without notice section 66 order. What it
 16 is envisaging is somebody who is, for example, sued upon
 17 an award or there's an attempt to enforce an award and
 18 the party seeks to resist enforcement on the basis that
 19 the arbitrators acted unfairly. One sees this from
 20 section 422(1), where Lord Justice Scrutton says in the
 21 Scrimaglio case:

22 "... the decisions are settled but once you have the
 23 arbitrator properly appointed and the objection to the
 24 award is that being properly appointed he has conducted
 25 himself improperly in the arbitration the award can be

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1 set aside on the grounds of misconduct. That cannot be
 2 set up as a defence to an action upon the award, the
 3 objection must be raised by a motion under the
 4 Arbitration Act to set aside or remit the award."

5 Now, what's that's envisaging is of course there is
 6 a section 66 procedure, but of course a party could, and
 7 perhaps at the time of Lord Justice Scrutton regularly
 8 might have done that, to -- can sue upon the award and
 9 say that the party is -- there is a cause of action for
 10 a failure to pay the sums awarded, a cause of action in
 11 debt. And what is envisaged is if that -- such
 12 an application -- if such an action is brought, the
 13 party seeks to resist the claim based upon the award by
 14 saying there was misconduct.

15 What the Court of Appeal is there saying is: I'm
 16 sorry, you can't do that. If you want to raise the
 17 issue of misconduct, or in our language serious
 18 irregularity, the objection must be raised upon a motion
 19 under the Arbitration Act to set aside or remit the
 20 award. Well, that's precisely what we have done and we
 21 say that that means, and I won't repeat myself, it means
 22 that the court should stay the section 66 in order for
 23 everything to be finally determined in November.

24 The other authorities really don't take the matter
 25 further than Scrimaglio itself. So we do, in our

1 skeleton, put forward alternative bases for our case
 2 here. We deal with public policy at paragraphs 52 and
 3 following, and the courts -- paragraph 54 and following,
 4 the court's inherent jurisdiction to suspend enforcement
 5 pending challenge to the award.

6 We say that the court has got no power, for the
 7 reasons I've said, to order security, but if the court
 8 did have power to order security, the court's power
 9 should be exercised consistently with its power under
 10 section 70(7), because, in our submission, it would be
 11 wholly anomalous for the court to award security under
 12 section 66 as the price of staying the order pending the
 13 hearing in November if the court would not order
 14 security under section 70(7), which gives the court
 15 express power to order security pending a section 68
 16 challenge.

17 So unless I can assist you further on that, those
 18 are my submissions on that application.

19 MRS JUSTICE MOULDER: Thank you.

20 Submissions by MR FOXTON

21 MR FOXTON: My Lady, I'm going to follow the same order as
 22 Mr Gruder and deal with my reply submissions on our
 23 application first and then respond to Mr Gruder.

24 Now, in relation to section 70(7) there is an issue
 25 of timing: when must the prejudice occur? It cannot be

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1 a requirement that it happens after the date of the
 2 hearing of the application to impose a condition.
 3 Otherwise the longer you were able to put off the
 4 hearing of the other side's application for a condition,
 5 a more of a free run you would get in terms of being
 6 able to move assets and so forth before any matters
 7 could be relied upon to support a condition.

8 I accept it runs from the date that the application
 9 under section 68 is issued and it runs of course not
 10 until the date of the hearing in November, but until the
 11 final disposition of the section 68 application. None
 12 of us know when that might be.

13 Now, in relation to the wholesale reliance upon the
 14 administrators, what, with respect to Mr Gruder, that
 15 does not adequately deal with is prejudice in the form
 16 of the inability to recover or trace assets using rights
 17 of the company from counterparties to whom they have
 18 been moved.

19 That is not wholly fanciful because we know that
 20 500 million was immediately moved out to the
 21 Liechtenstein trust. We know that there have been other
 22 movements of assets prior to the administrators'
 23 appointment.

24 The administrators themselves do not control what is
 25 happening in any recipients of funds from BSGR and they

1 do not pretend to have any control over that. So
 2 nothing in relation to what the administrators can and
 3 cannot do answers that prejudice.

4 Mr Gruder says, well, you should fund the current
 5 administrators --

6 MRS JUSTICE MOULDER: Sorry, just on that, I seem to recall
 7 in Mr Cohen's witness statement he said that your
 8 clients had been asked to provide --

9 MR FOXTON: The very point I was coming to next, my Lady --
 10 MRS JUSTICE MOULDER: -- details. All right.

11 MR FOXTON: -- if I may.

12 It is said by Mr Gruder, well you should fund these
 13 claims yourselves. But that is a request that we fund
 14 administrators who describe our complaints about the
 15 conduct of BSGR management as "unsubstantiated
 16 assertions" and do so notwithstanding the findings that
 17 have been made by this tribunal in this award, in
 18 circumstances where those administrators are acting on
 19 the basis of funding from the very people against whom
 20 those claims may well need to be brought.

21 We do say that the suggestion that in those
 22 circumstances we should fund the administrators, while
 23 they are still liaising with management and funded by
 24 the shareholder to investigate claims against
 25 Mr Steinmetz and others, is, with respect, unrealistic

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1 to expect any creditor to do that.

2 The great benefit of being to enforce and liquidate
 3 is that there would be no ongoing link, as it were,
 4 between the potential objects of such recovery
 5 litigation and those managing BSGR, and that is
 6 a fundamental point of distinction.

7 The funding agreement in fact does not allow the
 8 administrators to resign. It has a provision, from
 9 recollection, that allows the funding entity to give
 10 three months' notice to terminate, but not the
 11 administrators themselves. For so long as the
 12 administration continues and they are the
 13 administrators, that agreement applies. So it is not as
 14 if one could say, well, we would like you to sever your
 15 links with the funding entity before we go into the
 16 merits of claims against the funding entity.

17 There is just a practical problem here that makes
 18 funding these administrators --

19 MRS JUSTICE MOULDER: Sorry, so you're saying that the
 20 administrators have put themselves in a position where
 21 they can't resign? That sounds a very extraordinary
 22 proposition.

23 MR FOXTON: I suppose if the court removed them as
 24 administrators or they went to the court to be removed,
 25 but the contract itself includes a unilateral provision

1 for termination. I should probably take your Ladyship
 2 to it in the ... (Pause).

3 It's in volume 2, tab 10, page 37 to 38. I think
 4 they would have to go to court and have themselves
 5 removed but there isn't a provision for service of
 6 cancellation by the administrators under this, only by
 7 the parent.

8 (Pause).

9 MRS JUSTICE MOULDER: I obviously don't have the opportunity
 10 to read this whole thing, but flicking through it
 11 clause 15 refers to administrator resigning his office
 12 by giving notice of resignation so I'm not really
 13 sure --

14 MR FOXTON: I accept if they cease to be administrator at
 15 all then this won't apply to them.

16 MRS JUSTICE MOULDER: Sorry, I've missed the point.

17 MR FOXTON: So long as they are administrator, they are
 18 administrator on the terms of this funding agreement
 19 with the parent. It's not a contract of servitude which
 20 requires them to carry on with that role, and it's not
 21 a contract in which they can both carry on with the role
 22 of being administrator and not be subject to the terms
 23 of this agreement.

24 MRS JUSTICE MOULDER: What's your objection therefore then
 25 to the funding agreement; just that it's connected with

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1 the former management?

2 MR FOXTON: In the context of the specific point under
 3 discussion, namely that we should be funding these
 4 administrators to pursue claims or investigate claims
 5 against parent companies and those behind parents
 6 companies, it is the practical, deeply unattractive
 7 nature of having that sort of a discussion with
 8 administrators at the same time as they are tied by the
 9 funding agreement to the very entities against whom the
 10 claims would need to be investigated and brought.

11 MRS JUSTICE MOULDER: All right.

12 MR FOXTON: Now, my Lady, in relation to the ICSID
 13 settlement, whatever merits the claims may or may not
 14 have had, somehow Niron, which appears to be a vehicle
 15 with which Mr Steinmetz has some connection, is somehow
 16 extracting value from the proposed settlement of it and
 17 on the ground, at least, Niron appears to be carrying on
 18 on the basis it will indeed be the person operating this
 19 concession.

20 The effect of that arrangement is that value from
 21 the ICSID claim is going, not to the creditors but to
 22 Niron and possibly to Mr Steinmetz. And, my Lady, we do
 23 say that against the background of the findings made by
 24 the tribunal, that is a deeply unattractive state of
 25 affairs.

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1 In addition, the ICSID arbitration seeks restoration
 2 of the concession. That's part of the relief sought.
 3 It's probably worth going to that in volume 1, tab 7, at
 4 page 18. (Pause).

5 Now, this is the administrators' report of
 6 7 March 2019 and at 4.1 it summarises the claim. My
 7 Lady will see from the last sentence of the first
 8 paragraph of 4.1:

9 "The company's claim seeks the restoration of those
 10 rights -..."

11 And that is a form of relief in which changing
 12 events on the ground --

13 MR GRUDER: If my learned friend could actually read the
 14 next three words.

15 MR FOXTON: "... together with damages."

16 I hope Mr Gruder knows me well enough to know that
 17 I would not deliberately fail to read three words.

18 MR GRUDER: Absolutely not, but you might inadvertently do
 19 so.

20 MR FOXTON: Well, there we are.

21 So it is seeking that together with damages.
 22 I don't know how that remotely helps Mr Gruder beyond
 23 giving him an opportunity to interrupt because part of
 24 the relief that is being sought is relief that
 25 a changing position on the ground clearly has

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1 implications for them.

2 My Lady, it's also said where does the figure come
 3 from? Where is your evidence of the quantification of
 4 prejudice? My Lady knows that the figure of 500 million
 5 is the amount of cash fraudulently obtained at the start
 6 that was immediately shot up to the Liechtenstein
 7 foundation. It is, with respect, an entirely legitimate
 8 inference that when someone fraudulently obtains
 9 £500 million and then shoots it up to another company,
 10 or indeed a foundation, straightaway, that that might be
 11 done in order to prevent recovery in the event that the
 12 fraud comes to light.

13 It is very difficult to try to quantify in
 14 mathematical terms what -- a risk of prejudice and what
 15 might or might not be recoverable. We've sought to go
 16 for a figure that has objective rational connection with
 17 the findings in the award, and is 25% of the amount
 18 outstanding. If the court takes the view that that
 19 figure is too high and in the light of the uncertainties
 20 to the assets a smaller figure would be appropriate, so
 21 be it. But in freezing injunctions it's not a case in
 22 which it can be said, well, we can show you the maximum
 23 value of assets capable of being affected by prejudice,
 24 limit it to that, because we do not have disclosure of
 25 the full extent of the value of BSGR's assets and, more

1 to the point, one is dealing here with prejudice in the
 2 inability to recover assets from third parties to whom
 3 they have been wrongfully passed by BSGR, not just
 4 against BSGR itself.

5 There was a suggestion by Mr Gruder we had brought
 6 this application with the intention of stifling but
 7 I think he accepts that there's no evidence that the
 8 application would, if granted, stifle the claim so
 9 I think that point falls away.

10 Then in relation to the costs order of
 11 Mr Justice Popplewell, of course the court has inherent
 12 jurisdiction to make that a condition of pursuing
 13 an application.

14 One of the reasons for summary assessment of costs
 15 is to bring home to parties the consequences of running
 16 bad points. That is a fortiori the case when the costs
 17 are ordered on an indemnity basis to mark the court's
 18 disapproval of the way in which the case has been run
 19 and those policies would be seriously undermined if
 20 a party could simply say, "Well, I'm not paying and I'm
 21 carrying on litigating the same matter at a second stage
 22 in the court regardless".

23 MRS JUSTICE MOULDER: You'll have to forgive me, but I'm not
 24 sure I understand how your condition of payment of those
 25 costs is sitting with the two applications. So on the

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1 one hand we have the application for security in the
 2 amount of 500 -- I hear what you say about the amount
 3 but leave it at that. On the other hand, and no doubt
 4 you're coming to it, we have the application for a stay
 5 or set aside. So I'm not quite sure where the
 6 Popplewell costs are fitting into those applications.

7 MR FOXTON: My Lady, it's not a section 70(7) or (6) and the
 8 reason for that is that Mr Gruder is right to say that
 9 on their own terms they deal either with in the case of
 10 section 70(7) amounts awarded by the tribunal -- and
 11 plainly the order of Mr Justice Popplewell is not
 12 an amount awarded by the tribunal -- or with security
 13 for costs of the set aside -- the section 68 application
 14 and plainly those costs are not costs of the section 68
 15 application.

16 So they are not capable of falling within either of
 17 those two heads, but the court is itself able to impose
 18 as a condition of bringing any claim a requirement that
 19 prior costs orders in the same matter have been paid.
 20 So it rests upon an independent juridical basis but we
 21 would submit a well-established one and that it is
 22 entirely appropriate to invoke in the circumstances of
 23 this case.

24 MRS JUSTICE MOULDER: The problem it seems to me is that
 25 raised by Mr Cohen in his evidence, where he says that

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1 is a debt which was outstanding at the point of
 2 administration and were the court to order it, there
 3 must be an argument that you are thereby getting
 4 priority for that debt.

5 MR FOXTON: There are, I think, three answers to that
 6 difficulty . The first is that the administration has
 7 not been recognised, despite a threatened application
 8 for recognition, such that it has no status as a reason
 9 not to pay debts in this jurisdiction .

10 Secondly, that the payment of the amount could come
 11 not simply from BSGR but from those who stand to benefit
 12 standing behind BSGR in much the same way as any order
 13 for provision of security might so come.

14 Thirdly, it is open to the court, if the court is
 15 concerned about this, to make the condition one of
 16 payment of the amount into escrow or into court on the
 17 same terms as any security , rather than outright payment
 18 to my clients .

19 MRS JUSTICE MOULDER: Sorry, what would that achieve?

20 MR FOXTON: I'm sorry, my Lady.

21 MRS JUSTICE MOULDER: What would payment into court achieve?

22 MR FOXTON: Because the court then has the ability to
 23 control the subsequent disposition of the payment if
 24 an insolvency event occurs such that it would be argued
 25 that paying it out to my clients would involve some form

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1 of unfair advantage over other creditors. (Pause).

2 My Lady, security for costs very briefly . Mr Gruder
 3 focused on counsel's fees. In fact, the counsel's fees
 4 are significantly higher today on his clients' part. As
 5 we're going there, Mr Gruder I think is on a £100,000
 6 brief compared with my £65,000. Mr Quirk on £50,000.

7 With respect to Mr Gruder, there is a great deal
 8 more work to do for the section 68 itself , not least
 9 there are 3,400 pages of exhibits to his clients'
 10 challenge application alone and we have not begun to
 11 wade through all the footnotes in para 11 of Mr Gruder's
 12 skeleton and compare the evidence said to have been
 13 given in the ICSID arbitration with the evidence in the
 14 LCIA arbitration and matters of that nature. So there
 15 is a great deal more to be done. (Pause).

16 Now, my Lady, that brings me to the set aside
 17 application and I do have to say that the submissions
 18 made to you by Mr Gruder on this point are completely
 19 heterodox as to -- what is implicit in there is that
 20 there is no enforcement of awards while a section 68
 21 challenge is pending. That is simply not and has never
 22 been the law. It's not what Mr Justice Eder says
 23 either.

24 Clearly, if the section 68 application succeeds
 25 while enforcement is under way, it is open to the court

1 and the court would inevitably -- and it would not even
 2 be opposed -- set aside any enforcement order that had
 3 been made or any orders following on from that. Just as
 4 success before the Court of Appeal leads to the setting
 5 aside of a judgment and any following consequential
 6 enforcement orders made on the basis of that judgment.
 7 That is because the setting aside of the award is
 8 a change of circumstance that allows the court to
 9 revisit the issue as to the status of enforcement, and
 10 that never causes any difficulties at all .

11 But the point here is the mere possibility of
 12 a challenge succeeding in the future does not provide
 13 a defence to enforcement in the meantime when that
 14 challenge is based on section 68 because of the
 15 presumptive validity of the arbitration award.

16 My Lady, there is a fundamental distinction, and
 17 an important one, between challenges based on lack of
 18 jurisdiction under section 67 and challenges based upon
 19 serious irregularity under section 68. Because an award
 20 where jurisdiction is disputed has no presumptive
 21 validity , in contrast to an award where it's accepted
 22 there is jurisdiction but the challenge is on the basis
 23 of serious irregularity .

24 Now, if authority is required for that proposition,
 25 we have it, amongst other places, in

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1 Mr Justice Tomlinson's judgment in Peterson Farms at
 2 tab 16 of the authorities bundle. My Lady, it's at
 3 paragraph 26 where the judge explains the conceptual
 4 difference between challenges under section 67 and
 5 section 68, your Ladyship I'm sure is familiar with the
 6 passage.

7 That conceptual difference is also reflected in the
 8 wording of section 66 itself , because if one goes to
 9 that, and it's in, I think amongst other places,
 10 bundle 3, it expressly contemplates lack of jurisdiction
 11 or a challenge to lack of jurisdiction as a reason to
 12 set aside enforcement. That's what section 66(3) says:

13 "Leave to enforce an award will not be given where
 14 or to the extent that the person against whom it is
 15 sought to be enforced shows the tribunal lacked
 16 substantive jurisdiction to make the award."

17 There is no similar language in section 66 about
 18 challenges under section 68 or procedural irregularity .

19 One reason that that is important is when one comes
 20 to Mr Justice Eder's decision in Y v S, because that, of
 21 course, was a case in which there was a jurisdictional
 22 challenge to the award.

23 Now, I don't know whether my Lady sufficiently
 24 recollects the matter from -- I know you were taken to
 25 the case a matter of moments ago, but it was

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1 a section 67 case. Now, a party with a section 67 is
2 able, under section 66(3), to say "I am challenging the
3 jurisdiction of the tribunal over me", and therefore
4 there is a complete overlap between a legitimate defence
5 to the enforcement order and the challenge to the court.

6 There is no such overlap when the complaint brought
7 by the party is not lack of jurisdiction but serious
8 irregularity.

9 So, my Lady, the argument that this can all be set
10 aside now because there is a future section 68 is, with
11 respect, hopeless.

12 Mr Gruder did not develop beyond his skeleton
13 argument on the issue about whether this might
14 constitute a public policy defence. My Lady will know
15 that section 68 itself includes public policy as one
16 head of serious irregularity and the court may feel that
17 in a section 68 application, not noticeable for the
18 number of the narrowing on the points taken, that head
19 of challenge is not brought to the award itself.

20 So we are plainly nowhere near public policy. The
21 attempt to elevate every serious irregularity to public
22 policy would mean a section 68 would automatically
23 prevent any attempt to register and enforce an award
24 under section 66. That, with respect, is plainly not
25 the law.

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1 Now, of course if judgment is entered under
2 section 66 the award stands in exactly the same position
3 as a domestic judgment of this court, with the ability
4 of the court to stay execution on terms, but subject to
5 very well-known principles. It is not automatic. One
6 doesn't lightly deprive the judgment creditor of the
7 fruits of the judgment. One looks at the balance of
8 prejudice. There's no evidence of prejudice to
9 Mr Gruder's clients here. One now certainly is able to
10 take advantage of looking at the prospective merits of
11 the appeal.

12 And our suggestion that stays of execution of
13 judgments entered under section 66 are decided on
14 conventional principles by reference to CPR 83.74 is, as
15 I think my Lady has spotted, supported both by
16 Russell on Arbitration and by Merkin, both of whom make
17 it clear that once the judgment is entered it is that
18 standard CPR rule that determines the enforcement
19 regime. It is Russell para 8-008, tab 47 of the bundle,
20 and Merkin, para 19-16 at tab 48, and we do submit that
21 that is well established principle.

22 There is no reason at all why these judgments
23 entered under section 66 should somehow stand
24 differently to judgments of the court delivered
25 following proceedings in the court. With respect to

1 Mr Justice Eder, who heard no argument on the point, the
2 suggestion that section 70(7) guides the exercise of the
3 stay on enforcement is wrong, because there is
4 a fundamental difference between imposing a condition on
5 the right of a party to argue a point at all and
6 imposing a condition on the indulgence to that party of
7 staying the execution that normally follows inevitably
8 from the entering of a judgment against them, even if
9 under appeal.

10 My Lady, that fundamental difference is, of course,
11 reflected in the very different approach taken under the
12 CPR between stays of execution of a judgment and
13 a request to the Court of Appeal to impose a condition
14 on the right to bring an appeal at all. And because
15 imposing conditions can raise stifling arguments,
16 imposing a requirement before execution will be stayed
17 does not raise a stifling argument, it simply raises
18 an argument of where is the balance of convenience and
19 prejudice against the presumption that the fruits of
20 judgments are not lightly to be denied.

21 So my Lady, for those reasons we say, first of all,
22 the attempt to say that the section 68 provides a reason
23 not to allow the application to enter the award as
24 a judgment to stand is completely misconceived and
25 wrong. The reliance on Y v S is completely wrong

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1 because that is a case where there was a challenge to
2 jurisdiction, which is a defence to an attempt to
3 enforce under section 66(3).

4 The relevant procedural framework for a stay of
5 execution is the standard CPR one, as the authorities
6 make clear, and the attempt to analogise between that
7 and section 70(7) is simply wrong.

8 My Lady, similarly the reference to IPCO is, with
9 respect, not on point. That was of course a case in
10 which fraud had been raised, which would be a public
11 policy defence to any attempt to enforce, and is
12 expressly preserved, I think, by section 81 of the Act.
13 In any event it came in a context in which the relevant
14 statute expressly gave a power to order security when
15 a party was relying upon a challenge in the curial court
16 but no power to order security when a party was
17 exercising its independent right to resist enforcement
18 in the enforcement court.

19 Here, by contrast, section 66(3) provides no basis
20 upon which section 68 challenges prevent enforcement and
21 one simply falls back on the standard CPR 83.7 wording.
22 And, my Lady, we do say that this is a case in which,
23 applying that well-known test, there is no way in which
24 BSGR come even close to getting the order that would
25 stay execution of a judgment. It has adduced no

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1 evidence at all of any prejudice that might flow from
 2 such an order being made. The merits of its challenge
 3 are, with respect, exceedingly poor and in those
 4 circumstances the starting presumption that it is a rare
 5 thing to deprive a successful party of the benefits of
 6 its judgment debt should also be the final point of the
 7 court's decision-making.

8 So, my Lady, I've dealt with that relatively briefly
 9 but your Ladyship seemed to be alive to all the various
 10 points and I hope that that wasn't too summary a set of
 11 submissions.

12 MRS JUSTICE MOULDER: Thank you.

13 Submissions by MR GRUDER

14 MR GRUDER: My Lady, I've got obviously the right to reply
 15 on the enforcement part. I just would like to have
 16 an indulgence just to give my Lady a reference which
 17 I forgot to give my Lady on the security for the claim
 18 part, which is bundle 2, tab 10, page 82, which is
 19 the -- which I forgot to show my Lady when I was taking
 20 my Lady through the draft agreement at page 82.
 21 I forgot to show my Lady the signature page of that
 22 memorandum of agreement or provisional agreement,
 23 whatever one calls it.

24 One sees the signature page. The first signature is
 25 by one of the joint administrators acting as agent

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1 without personal liability , without giving any
 2 representation:

3 "... subject to finalisation of a formal contract
 4 with the entry into and execution of any such formal
 5 contract being first sanctioned by an order of the Royal
 6 Court of Guernsey and signed in accordance with and
 7 subject to their duty as administrator on the basis that
 8 this document shall be governed by the laws of the
 9 Island of Guernsey."

10 Then one of the directors of BSGR signs, one of the
 11 directors signing:

12 "... subject to the finalisation of the formal
 13 contract and signing on the basis that this document
 14 shall be governed by the laws of the Island of
 15 Guernsey."

16 And then there is another director. The same basis.
 17 I forgot to show my Lady to that.

18 Now, if I can come to my learned friend's argument
 19 and --

20 MRS JUSTICE MOULDER: Mr Gruder, I'm not going to cut you
 21 short but we are going to need a transcriber break, so
 22 I don't know how long you're going to be. Is now
 23 a convenient moment?

24 MR GRUDER: It is a convenient moment. Thank you my Lady.

25 MRS JUSTICE MOULDER: Let's take the transcriber break now,

1 as I said I didn't want to cut you off shortly.
 2 Thank you.

3 (3.12 pm)
 4 (A short break)

5 (3.22 pm)
 6 MR GRUDER: My Lady, can I first of all deal, perhaps in
 7 reverse order, with the arguments my learned friend made
 8 based on CPR Order 83 to say that I am seeking a stay of
 9 execution of a judgment and the court's normal powers
 10 and the discretionary factors the court takes into
 11 account apply.

12 My Lady, I mean, I'm obviously telling my Lady what
 13 my Lady already knows, CPR 83.7 deals -- starts :

14 "At the time that a judgment or order for payment of
 15 money is made or granted or any time that a debtor or
 16 other party liable to execution of a writ of control or
 17 warrant may apply to the court for a stay of execution."

18 That's page 2396 of the White Book.

19 There is a fundamental flaw in my learned friend's
 20 argument. There is no judgment. There is no judgment
 21 in this case. We're not seeking a stay of execution,
 22 and I can demonstrate this to my Lady very, very easily.
 23 If my Lady will come to volume 5, tab 17, one finds the
 24 remedy-- the application notice for -- which Vale
 25 issued which led up to the Bryan judgment. Paragraph 9:

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1 "The court seeks permission to enforce the award in
 2 the same manner as a judgment or order of the High Court
 3 to the same effect pursuant to section 66 excluding the
 4 post-interest award--"

5 And the rest:

6 "It reserves the right later in its discretion to
 7 seek to enter judgment in terms of the award pursuant to
 8 section 66(2) of the Arbitration Act."

9 They have not done that. There is no judgment.

10 And if one goes to the Bryan order, which one finds
 11 at tab 19, one sees that 1 gives them permission to
 12 enforce the award in the same manner as a judgment.
 13 Paragraph 2:

14 "Permission having been granted under section 66(2)
 15 as aforesaid, the claimant may later request that
 16 judgment be entered in terms of the award under
 17 section 66(2) of the Arbitration Act."

18 So there is no judgment. They have liberty to
 19 enforce the award in the same manner as a judgment, but
 20 there is no judgment entered against us and therefore
 21 all my learned friend's arguments based on CPR 83.7 are
 22 misplaced.

23 Secondly, my Lady, if then CPR 83.7 has no
 24 application, and all those authorities about it, which
 25 in my submission is correct, then if you are going to

1 stay this order, then, in my respectful submission, the
 2 order, if it's stayed, it prevents them from obtaining
 3 the fruits of their award.

4 And an application under section 68 also potentially
 5 challenges their right under the award. If
 6 section 70(7) -- if there is a power for the court to
 7 order security -- in my respectful submission there is
 8 no power because Mr Justice Eder was right -- any power
 9 has to be exercised consistently with the power under
 10 section 70(7), and you've obviously got my submissions
 11 on that.

12 If I can then come to my learned friend's argument
 13 that what I'm saying is heterodox, what my learned
 14 friend is seeking do here -- now, in a normal situation
 15 our section 66 application would actually come on at the
 16 same time as the section 68 application. I mean, it
 17 makes sense, because they are two sides of the same
 18 coin.

19 Now, there is a timing difference here. It was
 20 managed by Mr Justice Teare in a way that our
 21 application to set aside the order should -- the Bryan
 22 order -- should come on at the same time as the security
 23 for costs and the security for the award application and
 24 not at the same time as the section 68.

25 So what my learned friend is trying to do is to take

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1 advantage of that -- it was a management decision, but
 2 to take advantage of that management decision in order
 3 to effectively have the benefit of two and a half months
 4 which, in my respectful submission, he shouldn't have.

5 And in my submission -- my learned friend says what
 6 I say is heterodox. In my submission, it's not
 7 heterodox for this reason: that one can -- if my learned
 8 friend is right, it means that in every case where there
 9 is a timing difference, that there is effectively -- the
 10 application to set aside the ex parte order comes on
 11 before the section 68 -- let's keep section 67 to one
 12 side, I accept there is potentially a difference
 13 there -- a section 68 application, a party can say well,
 14 there are these allegations and, you know, it's all
 15 going to be determined in a few months' time but the
 16 award is presumptively valid, you know, and therefore
 17 make the order final. And in my submission my
 18 submissions are not heterodox. They are actually bound
 19 up in the words "finally determined" and the fact that
 20 in -- with all due respect to Mr Justice Teare, in
 21 a properly managed situation the -- our application
 22 under section 66 would come on at the same time as our
 23 application under section 68. And that, in my
 24 submission, is the long and short of it.

25 My learned friend then sort of struggled, with all

1 due respect, to try and get the court to order security
 2 for us to pay the Popplewell costs order as somehow
 3 security or a condition and he said it's -- there are,
 4 I think, very established foundations and jurisprudence
 5 to justify that. But I note, with all due respect, that
 6 he didn't produce one rule of court, one statute, one
 7 authority to substantiate the fact that the court can
 8 bring in a liability to pay a costs order on a totally
 9 different application, albeit an arbitration
 10 application, as somehow a condition for granting a stay
 11 of a section 66 order.

12 So unless I can assist you further, those are my
 13 submissions. (Pause).

14 Amendment. Yes, there is one further application,
 15 which is our application to amend the application, the
 16 arbitration application, which one finds at bundle 5, at
 17 tab 20 -- well, effectively there are a number of tabs
 18 which precede tab 28, but it's really, I think, tab 28
 19 which shows the amendments.

20 And what the amendments show is that a number of, as
 21 one can see in red, challenges which were made have been
 22 dropped as independent challenges, but they are --
 23 remain as the context which the court should take into
 24 account.

25 So if one looks at page 2 of that section, one sees

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1 instead of there being a pattern of conduct, it just
 2 says "conduct" and then "apparent bias", and then
 3 there's a deletion. I think it's fair to say that these
 4 are substantially rowing back rather than adding things,
 5 although words are put in to try and connect it.

6 So if one sees at paragraph 7, it says:

7 "BSGR relies specifically on the tribunal's refusal
 8 to admit the ICSID hearing transcript and post-hearing
 9 brief on to the record."

10 And that is the meat of the application.

11 Then 7(a):

12 "The context, which is of particular importance to
 13 that decision, which is developed below is ..."

14 Then the matters on page 4, which were independent
 15 grounds under section 68 now become context, one, two
 16 and three.

17 Then one -- pages 4 onwards deal with the ICSID
 18 transcript point, which is the main point, and that goes
 19 on, my Lady, for a number of pages, as one sees.

20 One then really has to go on, there are no changes,
 21 until one gets to 15, page 15, and then those matters
 22 under 2, the refusal to reschedule the final hearing and
 23 not believing what Mr Wolfson said about his
 24 availability and his diary, and 3, on page 17, failure
 25 to reconsider the earlier decisions, and 4 refusal, on

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1 page 18, to reproduce the original appointment
 2 procedure, become context rather than independent,
 3 context in which the court should consider the failure
 4 to allow us to put in the transcript, the ICSID
 5 transcript, against which that should be dealt with.

6 On page 20, you see the failure to deal with the
 7 frustration damages issue, which I erroneously said had
 8 been dropped but has not been dropped.

9 So that's what we're doing. We drop three
 10 independent grounds under section 68 but effectively
 11 say, well, you can't just approach the ICSID -- I mean,
 12 there is obviously a long history of this arbitration
 13 and, indeed, as you see from the way the other side have
 14 put their case today, they also rely upon history in
 15 trying to say that there's guerrilla tactics. Well, we
 16 say you can't just approach the question of the ICSID
 17 transcript as if it was in a vacuum. You have to look
 18 at what went on round about, either before --
 19 effectively it's before then because the failure to
 20 allow them in came out at the time of the award, but in
 21 the immediate run-up to the application and so on.

22 So those are my submissions, and we deal with it
 23 very briefly on page 23 of our skeleton argument,
 24 paragraphs 55 to 58.

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1 Submissions by MR FOXTON

2 MR FOXTON: My lady, like Mr Gruder, I have to crave
 3 indulgence for one reference I should have given your
 4 Ladyship before, Mr Justice Teare's order, bundle 5,
 5 tab 5, page 4, when he made clear:

6 "... the reason for the set aside application being
 7 heard today was there is a real issue as to whether the
 8 existence of a section 68 challenge is sufficient ground
 9 for setting aside an enforcement order."

10 So not quite the pure case management decision,
 11 something rather more --

12 MRS JUSTICE MOULDER: I'm sorry, I missed the reference.
 13 Could you give me the reference again, please?

14 MR FOXTON: Certainly, my Lady, it is bundle 5, at tab 25,
 15 page 4.

16 MRS JUSTICE MOULDER: Thank you.

17 MR FOXTON: My Lady, in relation to the amendment
 18 application, whilst we are always delighted when bad
 19 points are dropped, even sometimes when they are only
 20 dropped temporarily, the idea that it's appropriate for
 21 these to remain in the arbitration claim form in
 22 circumstances in which they are not alleged to represent
 23 legitimate section 68 complaints, we say that there is
 24 no merit in that at all. This is an attempt to try and
 25 keep these grievances alive but without having the

1 courage to strike and make the points in relation to
 2 them. Their presence on the claim form is open to
 3 misunderstanding, potentially, in enforcement
 4 jurisdictions as to the scope of the challenge. And
 5 pleading context of any kind but, a fortiori, three
 6 types of context that clearly are implicit criticisms of
 7 the arbitrators in a claim form, we submit, is wholly
 8 inappropriate.

9 So the answer is that if they are being abandoned,
 10 then they should be deleted and the costs of and
 11 occasioned by them should be ordered to be paid; and, in
 12 any event, abandonment should be on terms that it is not
 13 open to BSGR to try and resurrect them in some
 14 enforcement jurisdiction at some future point in time.

15 My Lady, the other provision that causes us concern,
 16 I think this is a point that causes Mr Hooker's clients
 17 concern as well, is the amendment at tab 28,
 18 paragraph 41 on page 19, and in particular the last
 19 sentence. If the only explanation of a decision is the
 20 tribunal is biased, that amounts to an allegation of
 21 actual bias. If, on the other hand, it's said the
 22 tribunal are not biased but they may have appeared to
 23 have been biased, then it cannot be said their refusal
 24 to admit the material is inexplicable on any other basis
 25 than bias.

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1 Now, I know Mr Gruder would not be advancing
 2 an allegation of actual bias here, but, once again, it
 3 is important for other contexts in which this claim form
 4 might fall to be read for there to be no
 5 misunderstanding. So, in any event, we do invite your
 6 Ladyship not to allow that last sentence.

7 MRS JUSTICE MOULDER: You're going to have to help me,
 8 because I'm not sure I understand the point about "open
 9 to misunderstanding in other jurisdictions".

10 MR FOXTON: When it comes to attempts to enforce this award
 11 or, indeed, ongoing attempts to enforce it in the US,
 12 English materials have been deployed as grounds of
 13 challenge, and allegations that appear in their content
 14 to be criticisms are capable of being misunderstood as
 15 live challenges -- query, live challenges not disposed
 16 of -- because the attempt to relabel them in this
 17 context may be lost in translation or lost elsewhere.

18 MRS JUSTICE MOULDER: But I don't understand what real
 19 effect that's having. I mean, this is a pending action,
 20 it's going to be pending for another couple of months,
 21 so I don't really understand what it is, therefore, that
 22 causes you a problem. Why would the US courts be
 23 interested in the nuances of the language in the
 24 allegations.

25 MR FOXTON: All one can say at the moment, my Lady, I don't

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1 know what other enforcement activities may be
 2 contemplated, but at the moment these grounds of
 3 challenge here are being relied upon as reasons to
 4 resist recognition under the New York Convention in the
 5 US and, presumably, elsewhere.

6 So, my Lady, it is appropriate that a claim form for
 7 section 68 relief should only set out the grounds of
 8 section 68 challenge, and if grounds are brought and
 9 abandoned, the right thing to do is to strike them
 10 through and not allow them some form of half-life
 11 thereafter.

12 Perhaps that shorter point may be the real nub of
 13 this.

14 MRS JUSTICE MOULDER: You see, what I'm reluctant to do is
 15 to get into the merits of this. It seems to me that,
 16 leaving aside whether or not there's any difference for
 17 arbitrations, I would not normally be attempting to
 18 draft somebody's particulars of claim or defence.
 19 I would say, "Sort it out at the hearing on the merits
 20 and argue it at the time". So I'm not really sure that
 21 I've understood -- I understand why you don't like it,
 22 but context can be relevant to disputes and so I'm
 23 struggling to understand what it is that means that this
 24 court should be trying to draft the dispute that you're
 25 going to have in a couple of months' time.

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1 MR FOXTON: Well, my Lady, Mr Gruder applies for permission
 2 to amend, and the standard exercise on any permission to
 3 amend is to look at the purpose and nature of the
 4 amendments.

5 MRS JUSTICE MOULDER: Yes, and one would strike it out if it
 6 disclosed no reasonable cause of action. I mean, there
 7 are various grounds on which one might refuse
 8 an application, but one doesn't normally get into the
 9 niceties of, "Well, I entered into an oral contract and
 10 this is the background context", for example.

11 MR FOXTON: But we're miles away from that, my Lady, because
 12 these undoubtedly, when they are brought forward, are
 13 brought forward as challenges to the conduct of the
 14 arbitrator.

15 Now, all that is being changed here is the label.
 16 They remain in their substantive content criticisms of
 17 the arbitrator, and that's simply not appropriate. If
 18 the points cannot properly be advanced, they should be
 19 removed.

20 In terms of providing context to the court, it
 21 remains open to Mr Gruder to make such submissions as he
 22 wants to make on the full range of evidence, but why
 23 single out these three as somehow special context to go
 24 in the pleading? The answer is they haven't been. They
 25 are simply there because they were wrongly pursued as

1 challenges in the first place, and that having finally
 2 been recognised, the appropriate course is for them to
 3 come out.

4 MR GRUDER: My Lady, can I first just come to
 5 paragraph 40 --

6 MRS JUSTICE MOULDER: Sorry, Mr Gruder --

7 MR GRUDER: Oh sorry, sorry.

8 Submission by MR HOOKER

9 MR HOOKER: My Lady, on behalf of the co-arbitrators, as
 10 I will call them, that's how they were described as by
 11 Mr Justice Popplewell in the previous section 24, we
 12 generally take the same position you've just outlined,
 13 which is that we're comparatively relaxed for BSGR to
 14 advance the claim in the terms that it wants to advance,
 15 and although we have a lot of criticisms about how the
 16 claim is now articulated, we're happy to address those
 17 at the hearing in November and take the claim as it's
 18 put.

19 I do think that some special considerations arise in
 20 the relation to paragraph 41.

21 MRS JUSTICE MOULDER: Yes, I do understand -- yes, my
 22 previous discussion was not focused on paragraph 41,
 23 which I agree is a separate point.

24 MR HOOKER: I mean, if it's helpful, I think the context of
 25 the arbitrators as defendants to this action is relevant

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1 context to the submission I'm about to make. It's
 2 comparatively unusual -- the circumstances are
 3 comparatively unusual, in that the arbitrators are
 4 defendant to an application that's pursued under
 5 section 68 and section 24, and to date the arbitrators
 6 have taken the position that they wish to assist the
 7 court but they have not served evidence in the
 8 proceedings. And by agreement of the parties, that was
 9 sequenced in such a way that the arbitrators had the
 10 opportunity to see the evidence that was introduced by
 11 the parties and to make a reasoned decision as to
 12 whether or not evidence from the members of the arbitral
 13 tribunal would assist the court. The decision was
 14 reached and explained in correspondence that they saw no
 15 need to do so.

16 That's quite a coherent position in the context of
 17 an allegation of apparent bias, because, essentially,
 18 the record speaks for itself. So in respect of this
 19 issue specifically, well, Mr Foxton took you this
 20 morning to the parts of the arbitral award which set
 21 out, over the course of two or more pages, the basis, as
 22 explained by the tribunal, for the decision not to allow
 23 records from the ICSID hearing to be admitted. That is
 24 the explanation. The inexplicable explanation is set
 25 out on the face of the award.

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1 Now, in the context of an allegation of apparent
 2 bias, that, essentially, is all anybody needs to have to
 3 refer to: look at the record. Does the record make out
 4 the allegation made that a reasonable observer would
 5 conclude bias?

6 Now, it may well be that the line that has got us
 7 animated isn't intended to change the nature of the
 8 allegation, but I do say it gives rise to potential
 9 prejudice two months from the trial, because if it's
 10 maintained and maintained in the form that isn't further
 11 clarified, then that decision that was reached by the
 12 co-arbitrators will necessarily have to be revisited,
 13 and they'll need to assess whether there is a different
 14 form of allegation that's been advanced. It may well be
 15 that this can be resolved very quickly and by agreement,
 16 and we're very happy to consider any revised form of
 17 drafting of this.

18 As I say, as to the remainder of the changes,
 19 although we would prefer the retreat to be complete, we
 20 are generally relaxed for the claim to be advanced.

21 MRS JUSTICE MOULDER: Thank you.

22 MR GRUDER: Well, if I can come to paragraph 41, I think if
 23 one reads paragraph 41, before one gets to the last
 24 sentence, it is quite clear that this is not
 25 an allegation of actual bias, this is an allegation of

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1 apparent bias, ie a fair-minded and informed observer
 2 would conclude there was a real possibility the tribunal
 3 was biased. That is a classic test, one has it in
 4 Halliburton, for apparent bias. The last sentence, which
 5 is in red, is not intended to convert that into
 6 an allegation of actual bias.

7 Now, I think probably the best way of dealing with
 8 this is for us to look at that last sentence to make
 9 it -- if there is any danger of misapprehension that
 10 this is an allegation of actual bias, then I think we
 11 possibly should look at that, because I don't believe --
 12 when one looks at the heading just above paragraph 41,
 13 it says, "Conclusion on apparent bias."

14 So I think the draftsman intended to say:

15 "The tribunal refusal to admit the ICSID material is
 16 inexplicable on any other basis other than there was
 17 a real possibility the tribunal was biased."

18 That's the intended meaning, but I think it's right
 19 for us to -- if this is open to some kind of
 20 misconception, I think the best thing is for us to
 21 look at that sentence, rather than to -- because, as
 22 I read it, and as I read that paragraph and indeed as
 23 I read the heading above that, this is an allegation of
 24 apparent, not actual bias.

25 So that's what I say about that.

1 As for the rest of this, we say that we're entitled
 2 to look at things in context and if we set out here the
 3 context that we wish the section 68 to be approached in
 4 the light of, in my submission, that's not
 5 objectionable.

6 I mean, in an arbitration which -- you've only had,
 7 I think, a sort of soupçon of some idea of what went on,
 8 one can't deal with these matters in a hermetically
 9 sealed jar, and, in my submission, there's nothing
 10 objectionable in the way we've sought to draft this.
 11 (Pause).

12 MRS JUSTICE MOULDER: Does that cover the full gamut of
 13 applications?

14 MR GRUDER: I think it does.

15 MR FOXTON: It does, my Lady.

16 MR GRUDER: It does my Lady, yes.

17 MRS JUSTICE MOULDER: All right. I propose to reserve
 18 judgment. I'm conscious of the time constraints, but
 19 nevertheless I think I'm not about to embark on
 20 an extempore judgment at 3.50 pm, given the range of
 21 applications.

22 I think I would only make one observation about that
 23 last discussion. I am concerned, in particular, about
 24 that last sentence. I am minded to give you 48 hours to
 25 see if you can agree a form of words that you want. If

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1 you can't agree, or if you decide, having reflected upon
 2 it, that you don't need the words, perhaps between you
 3 you can let me know.

4 MR GRUDER: Yes.

5 MRS JUSTICE MOULDER: Depending where you come out, I will
 6 then rule as necessary.

7 MR GRUDER: So be it, my Lady, yes. I am very grateful.
 8 MRS JUSTICE MOULDER: Unless there's any objection to that
 9 course of action?

10 MR FOXTON: No, that sounds very sensible. I always hope
 11 Mr Gruder and I will be able to agree something, my
 12 Lady.

13 MRS JUSTICE MOULDER: Right.

14 MR HOOKER: Yes.

15 MRS JUSTICE MOULDER: All right. Well, I am grateful to
 16 counsel for their submissions. As I say, I do
 17 understand the time constraints, but, equally, I need
 18 an opportunity to reflect.
 19 Thank you very much.

20 (3.52 pm)

21 (The court adjourned)

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